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TRANSCRIPT OF RECORD.

621

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

~~No. 320~~ 45

THE DES MOINES NAVIGATION AND RAILROAD
COMPANY, PLAINTIFF IN ERROR,

vs

THE IOWA HOMESTEAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED SEPTEMBER 26, 1884.

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Records
1887
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Supreme Court U. States
123 U. S.

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1 On the 17th day of Nov., 1884, the pl'ff (def't in error) filed an abstract of the record in the office of the clerk of the supreme court of Iowa, the same, with the endorsements and stipulations thereon, being in the words and figures following, to wit:

Appellant's Abstract of Record.

"Supreme Court of Iowa. December Term, Dubuque, A. D. 1883.
In Equity.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY.

Appeal from the Webster district court.

Geo. Crane, attorney for appellant; C. H. Gatch, attorney for appellee.

January 5th, 1877, the plaintiff, the Iowa Homestead Company, filed its petition in equity in said district court of Webster county in the words and figures following:

Par. 1. The plaintiff, the Iowa Homestead Company, a corporation duly organized and existing under and by virtue of the laws of the State of Iowa, complains of the defendant, the Des Moines Navigation and Railroad Company, a corporation organized and existing under the laws of Iowa, and of the county of Webster, a municipal corporation under the laws of Iowa, and says that in or about the year 1863 the said homestead company received from the Dubuque & Sioux City Railroad Company, a corporation also
2 existing under and by virtue of the laws of Iowa, a deed, duly
signed, executed, and delivered by said railroad company, purporting to convey in fee-simple absolute to the said homestead company the following-described real estate:

All of sec. 3 and W. ½ of N. E. ¼ of sec. 7, and E. ½ of N. E. ¼ and N.W. ¼ of S.W. ¼ and lots 1, 3, 4, 5, and 6 of sec. 15, and E. ½ of S. E. ¼ and lots 1, 2, 3, 4, and 5 of sec. 17; N. ½ of S.W. ¼ of sec. 19, and E. ½ of S. E. ¼, and S. W. ¼ of S. E. ¼ and lots 6, 7, and 8 of sec. 21; S. W. ¼ of S. W. ¼ and lots 4, 5, and 6 of sec. 23; all of sec. 27, 29, and 31, and E. ½ and S. W. ¼ of sec. 33, and all of sec. 35.

Also lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and N. E. ¼ of N. E. ¼ and W. ½ of S. W. ¼ of sec. 1; N. E. ¼ of sec. 3; W. ½ of S. W. ¼ of sec. 11; S. E. ¼ of N. W. ¼ of sec. 13; E. ½ of sec. 15; S. ½ of N. W. ¼ of sec. 21; N. ½ of N. E. ¼ of sec. 23; E. ½ and S. ½ of S. E. ¼ of S.W. ¼ of sec. 25; E. ½ of N. E. ¼ and N. W. ¼ of N. E. ¼ and N. E. ¼ of S. E. ¼ of sec. 29; all in township 87 north, of range 28.

Also N. ½ of sec. 1; N. E. ¼ of N. E. ¼ of sec. 3; all in township 87 north, of range 29.

Also W. ½ of N. E. ¼ of sec. 15, in township 88 north, of range 88.

Also lot 7 of sec. 15, and lots 1, 2, 3, 5, 6, and 7 of sec. 23; N. ½ of S. E. ¼ and S. E. ¼ of S. E. ¼ of sec. 25; all in township 88 north, of range 28.

Also N. ½ of sec. 7; N. ½ of N. E. ¼ of sec. 29; all in township 88 north, of range 29.

Also S. ½ of N. W. ¼ of sec. 21; S. ½ of N. W. ¼; S. W. ¼; S. ½ of S. E. ¼ and N. W. ¼ of S. E. ¼ of sec. 27; S. ½ of S. E. ¼ and N. W. ¼ of sec. 29; all of sec. 31; all in township 89 north, of range 27.

Also S. E. ¼ and N. ½ of S. W. ¼ and S. W. ¼ of N. W. ¼ and W. of N. W. ¼ of N. W. ¼ of sec. 23; E. ½ of S. E. ¼ of sec. 35; all in township 89 north, of range 28.

3 Also E. ½ of sec. 23, and E. ½ of sec. 35; all in township 90 north, of range 28.

All in Webster county, State of Iowa; a copy of which deed is hereto annexed, marked Exhibit A, and made a part of this petition.

Par. 2. Plaintiff further avers that from and after the execution and delivery of said deed as aforesaid till the year A. D. 1873, the said homestead company honestly and in good faith believed that it was the absolute owner of and held a good and valid title to the land aforesaid; but in the year A. D. 1873 the Supreme Court of the United States, in a suit therein pending for the purpose of testing the right and title of said homestead company to said lands, decided finally that said company was not the owner thereof and never had any right or title thereto, since which time said company has not claimed to be the owner of said lands.

Par. 3. Plaintiff further claims that during the continuance of such belief and claim of ownership the said homestead company gave or delivered over to Webster county, a municipal corporation organized and existing under the laws of the State of Iowa, and within whose territorial limits said lands are situated, the taxes duly assessed and levied by said county upon said lands—that is to say, the following amounts for the following years, respectively:

For the year 1864	$1,532 85
For the year 1865	2,598 27
For the year 1866	3,149 37
For the year 1867	1,863 27
For the year 1868	2,221 53
For the year 1869	2,911 09
For the year 1870	3,375 70
For the year 1871	3,926 93

And took from said county receipts showing the amounts so handed over to said county.

4 4. Plaintiff further avers that the taxes so assessed and levied by said county upon and against said lands became and were a valid and binding lien thereon in favor of said county, which said lien was paramount to all other liens and encumbrances thereon; that long prior to the assessment and levy of said taxes upon said lands the said The Des Moines Navigation and Railroad Company, defendant, became and was the legal owner thereof and ever since has been such owner, but of the defendant's said ownership the plaintiff had no knowledge or notice at the time of receiving its deed therefor, nor till about the year A. D. 1873, and long after the payment of said taxes.

Par. 5. Plaintiff further avers that said defendant has never paid to said county the taxes aforesaid or any part or parcel thereof.

Par. 6. Plaintiff further avers that said county has always hitherto refused and still refuses to refund to plaintiff or its assigns the taxes given or delivered over to said county by said plaintiff as heretofore alleged, and said county has always hitherto refused and still refuses to take any steps whatever to collect the aforesaid taxes from the said defendant or any part thereof or to enforce the lien given by the law upon said lands to secure the due payment thereof.

Par. 7. Plaintiff further avers that said county has the legal right and power and is in duty bound to collect the taxes aforesaid from the defendant, who was the legal owner of said lands at the time said taxes were levied against the same, and were justly bound to pay said taxes to said county.

8. Wherefore the plaintiff prays that an account be taken of the amount of taxes said defendant should pay, and that a decree for the amount so found to be due be entered up against said defendant in the name of said Webster county, for the use and benefit of plaintiff, and made a lien upon the lands hereinbefore described;
that said lands be ordered to be sold to pay off said decree;
5 and that plaintiff have such other and further relief in the
premises as equity and good conscience may require, and to this court may seem meet.

GEO. CRANE,
Att'y for Plaintiff.

On the 5th day of January, 1877, the said defendant acknowledged due personal service of the original notice in said suit, and the receipt of a copy thereof and of the petition therein.

Afterwards, on the 7th day of July, the said defendant filed its answer in the words following, to wit:

Comes now the defendant, The Des Moines Navigation & Railroad Company, and answers the petition of plaintiff herein, and for answer—

1. Denies each and every allegation in said petition contained.

2. Further answering, this defendant says that in an action wherein the plaintiff herein was plaintiff and this defendant and others were defendants, commenced in the district court in and for the county of Webster and State of Iowa, and finally determined by the Supreme Court of the United States, said homestead company asserted and maintained a right of recovery of this defendant of the same taxes, the recovery of which is sought herein; that one of the issues made by the pleadings and determined by the proofs in said action was as to the right of the plaintiff to recover the same, and that it was therein determined and adjudged finally by said last-mentioned court, at the December term thereof, A. D. 1872, that said plaintiff was not entitled to recover the same or any part thereof, which said determination and judgment has never in any manner been set aside, vacated, or modified, but still remains in full force.

3. And, further answering, defendant says that if any cause of action ever accrued to plaintiff against defendant for the recovery of said taxes, or any sum of money on account thereof, for any of said

years in the petition mentioned, the same did not accrue at
6 any time within five years next before the commencement of
this action, and is thereby barred by the statute of limitation.

4. And, further answering, defendant says that if plaintiff paid said taxes or any part thereof it paid the same voluntarily and without the request, knowledge, or consent of the defendant, or any one having any right to or interest in said lands, and with full knowledge of all the facts with respect to the claim of title thereto by this defendant.

WRIGHT, GATCH & WRIGHT,
Attorneys for Defendant.

And afterwards defendant filed an amended answer as follows:

Comes now the defendant, and, by leave of court, amends its answer herein as follows:

1st. It says that plaintiff is not the real party in interest herein, and is neither the legal nor equitable owner of said alleged cause of action, the same not having been assigned to him by said pretended assignment.

2d. Says it is not true that the question as to the title and ownership of said lands as between the respective grantors of plaintiff and defendant was not finally decided until 1873, and withdraws so much of his answer heretofore filed herein as either expressly or by implication admits that the same was then finally decided, and avers that the same was definitely and finally decided at the December term, 1866, of the Supreme Court of the U. S., in the cases of Wolcott *vs.* Des Moines Nav. & R. R. Co. and Burr *vs.* same company, reported in 5 Wall., 681 and 689.

C. H. GATCH,
Attorney for Defendant.

And afterwards plaintiff filed his reply as follows:

And now comes the plaintiff, and for reply to the answer
7 of the defendant, The Des Moines Navigation and Railroad
Company, denies each and every allegation therein contained; and for reply to so much of said answer as sets up a previous adjudication says that the decree or judgment referred to is null and void, for the reason that the courts of the United States had no jurisdiction of said suit and no legal power or authority to render said decree or judgment. Wherefore plaintiff prays judgment for said sum of twenty thousand dollars, interest and costs.

GEORGE CRANE,
Attorney for Plaintiff.

And afterwards, on the — day of ——, 1883, the cause came on for final hearing, and was duly submitted to the court on the pleadings and the following agreed facts and evidence, to wit:

Agreed Statement of Facts.

For the benefit of all the parties hereto and for all the purposes of this suit the following facts and statements are admitted and the following stipulations made:

First. The statements contained in the first and second paragraphs of plaintiff's original petition herein are admitted to be true.

Second. In the year 1860 and thereafter, until the year 1873, the defendant, The Des Moines Navigation and Railroad Company, was the owner in fee-simple of the lands mentioned and described in plaintiff's petition.

Third. The county of Webster duly and legally levied and assessed upon the lands aforesaid for the years named the several amounts of taxes set forth in Exhibit "A," hereto attached and made part hereof, and said several assessments were made by said county to unknown owners.

Fourth. The Iowa Homestead Company paid to said county the several amounts of taxes mentioned in said Exhibit A
8 at the several dates therein set forth, and took from said county receipts for the sums of money so paid, in the form following:

TREASURER'S OFFICE, WEBSTER COUNTY, IOWA,
FORT DODGE, —— —, 1867.

Received of W. J. Barney, agent for the Iowa Homestead Company, — dollars in full of the following taxes for the year 1866 on the annexed real estate.

Description of Lands.

Town lots.	Lot.	Block.	Sec.	T.	R.	Acres.	Kind of tax.	Int.
							County. State. Co. school. Bonds. District. B. C. & R.	

Fifth. At the times of said several payments of taxes as aforesaid by said homestead company said company did not know or believe that defendant was the owner of said lands, but knew that it claimed to own them.

Sixth. Said several sums of money were so paid to said county without any actual demand or request by said county therefor.

Seventh. Said defendant has never paid said taxes to said county, or any part thereof.

Eighth. Said county has always hitherto refused to refund to said homestead company or to said plaintiff Goodnow the taxes paid as aforesaid, although demanded.

Ninth. The lands mentioned and described in the petition are a part of the lands that were in controversy in the said case of The Iowa Homestead Company *vs.* The Des Moines Navigation and Railroad Company *et al.*, reported in 17 Wallace, page 153.

9 Tenth. The following is a correct copy of the decree rendered by the Supreme Court of the United States in the said case of The Iowa Homestead — *vs.* The Des Moines Navigation & Railroad Company *et al.*, reported in 17 Wallace, 153, to wit:

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Iowa, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and is hereby, affirmed, with costs.

And it is hereby stipulated—

First. That the reports of the cases of The Dubuque & Pacific Railroad Company *vs.* Edwin C. Litchfield, 23 Howard, 66, and The Iowa Homestead Company *vs.* The Des Moines Valley Railroad Company, 17 Wallace, 153, as therein reported, shall be received as evidence and considered by the court as far as material to any of the issues herein.

Second. That the printed transcript of the record in the Supreme Court of the United States in said case of The Homestead Company *vs.* The Des Moines Valley Railroad Company may be received as evidence and considered by the court with like effect as the original might be, so far as material to any of the issues herein, either party having the right to offer in evidence such portions as he or it may deem relevant and material.

Third. That the printed copy of the record in the case of Edwin C. Litchfield *vs.* Webster County and Jonathan Hutchinson, in the United States circuit court, district of Iowa, herewith filed and marked Exhibit "B," may be received as evidence and considered, so far as relevant or material to any of the issues herein.

10–16 Fourth. That the costs of Exhibit "A" shall be taxed as part of the costs of this suit.

WRIGHT, GATCH & WRIGHT,
Attorneys for Defendant Litchfield.
GEORGE CRANE,
Attorney for Plaintiff.

EXHIBIT A referred to in foregoing agreement, showing dates and amounts of payments of taxes on said lands and for what years paid.

	Date of payment.	Amount paid.
For the year 1864	January 16, 1865	$315 87
" 1865	November, 25, 1865	429 98
" 1866	February 28, 1867	554 11
" 1867	July 1, 1868	618 24
" 1868	April 26, 1869	626 05
" 1869	February 28, 1870	622 49
" 1870	February 28, 1871	906 96
" 1871	February 29, 1872	911 90

We hereby agree to the foregoing, subject to the right to have Exhibit "A" corrected to conform to the facts if found to be in any respect erroneous.

WRIGHT, GATCH & WRIGHT,
Sol's for Des M. Nav. & R. R. Co.

March 13, 1883.—Plaintiff filed an amended petition as follows:
And now comes the plaintiff, The Iowa Homestead Company, and, by leave of court first had and obtained, amends its petitions in this cause by striking therefrom all claim in this suit for a lien on the lands in said petitions described, and asks for no other relief herein than a judgment against the said Des Moines Navigation & Railroad Company for the amount of money mentioned in said petitions and interest thereon. Said plaintiff, therefore, asks judgment against the said defendant for the sum heretofere prayed for, with interest and costs of suit.

GEORGE CRANE,
Attorney for Plaintiff.

(N. B.—Paging jumps from 10 to 17, though no omissions were made.)

17 EXHIBIT C, referred to in said agreed statement of facts.

Supreme Court of the United States.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY *et al.*

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Iowa, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this Court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

April 28th, 1873.

The plaintiff then read in evidence from the printed transcripts of the record in the Supreme Court of the United States, in the case of The Iowa Homestead Company against The Des Moines Valley Railroad Company, referred to in said agreed statement of facts, the following portions thereof:

In the District Court of Webster County, Iowa.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, EDWIN C. Litchfield, Electus B. Litchfield, Samuel G. Wolcott, *et al.*, and Roswell S. Burrows.

To said defendants above named:

You are hereby notified that there is now on file in the office
18 of the clerk of the district court of Webster county, Iowa, the pe-

tition of plaintiff aforesaid, claiming of you that the said Iowa Homestead Company is in possession and has the legal title to certain lands in the alternate sections within five miles of the Des Moines river, above the Raccoon Forks; that you claim in some way an adverse title thereto; that you be enjoined from prosecuting actions at law or pre-emptions to said lands to quiet the plaintiff's title, and for other relief. You are also notified that unless you appear thereto and defend before noon of the 2d day of the term of the said district court of Webster county, to be held on the 12th day of October, 1868, a default will be entered against you and judgment rendered thereon.

IOWA HOMESTEAD COMPANY,
GRANT & SMITH, *Attorneys.*

DES MOINES, IOWA, 10*th October*, 1868.

Accepted service for the defendants, The Des Moines Navigation and Railroad Company and Edwin C. Litchfield and Electus B. Litchfield.

JOHN BROWN,
Agent for Defendants.

At chambers, city of Davenport, Scott county, Iowa.

Ordered, That a temporary writ of injunction do issue, as prayed, on plaintiff's filing bond in penal sum of $500, conditioned as required by law, and the sureties to be approved by the clerk of Webster county, Iowa, district court.

Dated 1st day of October term, A. D. 1868.

JOHN F. DILLON,
Chief Justice Supreme Court Iowa.

THE STATE OF IOWA
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, Electus B. Litchfield, The Des — Valley Railroad Company, *et al.*

19 Whereas the Iowa Homestead Company has filed in our district court for the county of Webster a petition claiming that the said homestead company, a corporation created by the laws of Iowa, has the legal title to the lands (which are mentioned and described in plaintiff's petition), and that you or some of you have brought and intend to bring certain actions at law against persons in possession of said lands to divert the title of said Iowa Homestead Company, and that you or some of you are about to prove up and claim pre-emptions on some of the lands which are named (in said petition), and has prayed in said bill to grant them title to said lands:

Now, these are to command you and each of you, your agents, attorneys, servants, that you do wholly refrain from prosecuting said actions at law or either of them, and that you wholly refrain from further applying for or proving up pre-emptions on any of said lands until the further order of our said district court for the county of Webster; and you will disobey this writ at your peril.

Witness, and in testimony, I, W. Lumpkin, clerk of the district court, have hereunto subscribed my name and affixed the seal of said court, at office, in Fort Dodge, this sixth day of October, A. D. 1868.

W. LUMPKIN,
Clerk District Court.

Accepted service of the within writ for the defendants, The Des Moines Navigation and Railroad Company, Edwin C. Litchfield, and Electus B. Litchfield.

J. BROWN,
Agent of said Defendants.

20 THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES RIVER NAVIGATION AND RAILROAD COMPANY.

In this cause come the defendants, Litchfields and John Stryker, and file their affidavit, bond, and petition for the transfer of this cause to the circuit court of the United States for the district of Iowa, under certain acts of Congress of the United States, and the court being satisfied that the said affidavit and petition are sufficient under the law, and said bond being approved by the court, it is ordered that this cause be transferred to said circuit court of the United States for the district of Iowa, as to said defendants *in re*, and the clerk of this court is ordered to make the proper papers for the said transfer.

STATE OF IOWA,
Webster County, } *ss:*

THE IOWA HOMESTEAD COMPANY
vs.
EDWIN C. LITCHFIELD, ELECTUS B. LITCHFIELD, and JOHN STRYKER, Impleaded with Rosswell S. Burrows, The Des Moines Navigation and R. R. Co., and Others.

I, John Brown, of Des Moines, in the county of Polk, in said State, being duly sworn, do depose and say that I am the agent of the defendants, Litchfield and Stryker, in the above-entitled action; that the same is now pending in the district court of Webster county, Iowa; that the said defendants, for whom I am agent as aforesaid, are citizens of the State of New York, and that the plaintiff is a citizen of the State of Iowa; that the matter in controversy and dispute between this plaintiff and each and every of the defendants exceeds the sum of five hundred dollars, exclusive of costs;
21 that I have reason to believe and do believe that, from prejudice and local influence, said defendants will not be able to obtain justice in the State courts of Iowa, in which this action is pending and untried.

JOHN BROWN.

Subscribed and sworn to by John Brown before me this 15th day of May, A. D. 1869.

GEORGE B. CORKHILL, *Clerk.*

Know all men by these presents that we, Edwin C. Litchfield and Electus B. Litchfield and John Stryker, as principals, and John Brown, as surety, are hereby held and firmly bound unto the Iowa Homestead Company in the penal sum of one hundred dollars, lawful money of the United States; to the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

The condition of this is such that if the said Edwin C. Litchfield, Electus B. Litchfield, and John Stryker shall enter or cause to be entered in the circuit court of the United States, to be held in and for the district of Iowa, copies of all process pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the district court of the county of Webster and State of Iowa, in which The Iowa Homestead Company is plaintiff and said Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, impleaded, etc., are defendants, and shall do such other appropriate acts as by the act of Congress approved July 27, 1866, entitled An act for the removal of causes in certain cases from State courts, are required to be done upon the removal of a suit into the United States courts, then this obligation to be void; otherwise, of force.

EDWIN C. LITCHFIELD.
ELECTUS B. LITCHFIELD.
JOHN STRYKER.
JOHN BROWN.

22 *Petition for Removal.*

To the district court of Webster county, Iowa:

The petition of Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, defendants in the above-entitled action, respectfully shows that they are citizens of the State of New York; that this action is now pending in the district court of Webster county, Iowa; that the matter in dispute herein exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioners further show that they have in this court their affidavit as required by the act of Congress approved March 2d, 1867, entitled "An act to amend an act entitled An act for the removal of causes in certain cases from the State court, approved July 27, 1866."

And your petitioners file this petition praying for the removal of this suit into the next circuit court of the United States to be held in and for the district of Iowa, and they herewith offer the surety required by the said above-entitled act.

D. O. FINCH AND J. M. ELLWOOD,
Attorneys for Defendants Litchfield and Stryker.

This affidavit, bond, and petition are filed in place of the original filed in district court of Webster county 13th October, 1868, the same appearing to be lost and not returned.

GRANT,
For Plaintiff.
J. M. ELLWOOD,
For Litchfield and Stryker.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY *et al.*

OCT. 16, 1868.

23 And now, on this day, come the defendants, Crouse, McDermott, and Cotter, by their attorney, G. Parsons, and file a motion to dissolve the injunction, which, coming on to be heard, and the court being fully advised in the premises, said motion is sustained as to them. Whereupon this cause is ordered transferred to the circuit court of the United States as to other defendants.

Webster District Court.

OCT. 13, 1868.

In this cause the defendants Litchfield and Stryker come and file their affidavits, bond, and petition for the transfer of this cause to the circuit court of the United States for the district of Iowa under certain acts of Congress of the United States, and, the court being satisfied that said affidavits and petition are sufficient under said law, and said bond being approved by the court, it is ordered that this cause, as to the said defendants, be transferred to said circuit court of the United States for the district of Iowa, and the clerk is ordered to make the proper papers for said transfer.

Mr. Clerk, please make the above entry in this cause, and the further entry that as to other defendants the cause is continued by agreement.

GRANT,
For Plaintiff.

The foregoing original notice, acceptance of service, order of Dillon, justice, writ of injunction, and acceptance of service thereof were read in evidence by plaintiff; also the affidavit of James Grant as to the truth of the matters contained in the petition or bill of complaint in said homestead suit, which was in the words following:

STATE OF IOWA, *Scott County:*

24 I, James Grant, being duly sworn, depose on oath that I am one of the attorneys for the plaintiff; that the facts stated in the foregoing petition are all of them of record, except the allegations of the interest and intent of the parties in the suit of Wolcott *vs.* The Des Moines Navigation Company. I have examined the records referred to in the bill, and have been informed as to the

facts about the Wolcott suit by parties who appeared to know them, and I believe the allegation of the bill to be true.

JAMES GRANT.

Sworn to and subscribed before me this 1st day of October, 1868.

JOHN F. DILLON,
Judge Supreme Court Iowa.

STATE OF IOWA, *Webster Co.:*

District Court.

THE IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES NAVIGATION & R. R. CO. *et al.*

"The petition of the Iowa Homestead Company shows—

"That said company is a corporation duly created by the laws and a citizen of the State of Iowa for the purpose of buying and selling lands in said State; that said plaintiff, by deed of purchase bearing date the 12th of November, 1863, acquired by and through the Dubuque & Sioux City Railroad Company all the right of said company, the Dubuque & Pacific Railroad Company, and the State of Iowa to about fifty thousand acres of land lying on the east side of the Des Moines river in Webster and Humboldt counties, Iowa, being the odd sections of land within the limits of the Dubuque & Pacific railroad grant of 1856 and the Des Moines river grant of 1846."

It is admitted that the above-described fifty thousand acres of land include and embrace all the lands mentioned and described in the petition of the said E. K. Goodnow in the suit now before this court.

25 "And by said deeds and certificates the plaintiff acquired a title to almost twenty thousand acres of land, in odd sections, within said grants in Webster and Hamilton counties, west of said Des Moines river, a list of which is hereto annexed and made part of this bill. Of these lands the fifty thousand acres lying east of the Des Moines river and claimed by the Des Moines Navigation & Railroad Company, a corporation created by the laws of Iowa, and its assigns, and some title or claim to twenty thousand acres of land on the west side of the river is, or has been, made by the Des Moines Valley Railroad Company, a corporation created by and a citizen of the State of Iowa. * * *

"On the 9th of June, 1854, the State made a contract with the Des Moines Navigation & Railroad Company, a corporation created by the laws of Iowa, to improve the navigation of the river, and to convey to said corporation all the remaining lands belonging to the State under the act of 1846. * * *

"After the settlement of the State with the Des Moines Navigation Company in 1858 the said navigation company conveyed certain parcels of the lands now claimed by the plaintiff to the following persons, among others: Samuel G. Wolcott, Wm. B. Wells, Roswell S.

Burrows, Edwin C. Litchfield, W. J. McAlpine, Richard B. Chapman, Albert Tracy, Francis A. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, and John Stryker. * * *

"The said plaintiffs have been in possession of the lands claimed by them, themselves or their vendees, in contract since 1861. They have paid the taxes thereon to the State of Iowa since, in all amounting to eighty thousand dollars, and if their title has failed they are entitled to have their taxes refunded since 1861 by the holder of the legal title, who has not paid them. * * *

"The plaintiff says he has no adequate remedy for the grievances
complained of except in a court of equity. He makes The Des
Moines Navigation & Railroad Company, Samuel G. Wolcott,
26 Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, Wm.
J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis
W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John
Stryker, The Des Moines Valley Railroad Company, Thomas Cotter,
Jacob Crouse, John B. McDermott parties defendant to this suit, and
prays for a writ of subpœna against them.

"The plaintiff prays that said parties may be enjoined from prosecuting said actions or any other actions at law in relation to the title or possession of any of said lands until the final hearing of the bill; that the injunction be made perpetual; that said defendants Cotter, Crouse, and McDermott be enjoined perpetually from prosecuting any pre-emption to any of said lands; that the conflicting acts of the Secretary of the Interior and judicial decisions may be finally interpreted; that the plaintiff may be quieted in their title and possession to said lands on both sides of the river, or if the plaintiff's title to the said lands is not the better title, and his title to the said lands is the title conveyed by the State, and failed under the right interpretation of the acts of 1846, 1856, and 1862, that his title to an equal number of acres in lieu thereof be decreed and established; that an account be taken of said indemnity lands, and the Des Moines Valley Railroad Company be decreed to make partition thereof and set apart and convey or relinquish to the plaintiff such lands as the plaintiff may be entitled to under said act of July 12th, 1862."

The State of Iowa, being acting trustee, to do justice in the premises
and to convey to such party as may be established the true benefi-
ciaries under said act, that in the event of a decree that the plaintiff's
present title or any part of it has failed, that the said Des Moines
Navigation and Railroad Company and its assigns may be decreed to
repay the plaintiff all the taxes which he has paid on said lands
and interest thereon; and that said Des Moines Valley Rail-
27 road Company be decreed to release to the plaintiff all claims
to the indemnity lands set apart to the plaintiff, and for such
other relief as the nature of the plaintiff's case may require.

GRANT & SMITH,
Attorneys for Plaintiff.

Comes the plaintiff, October 23, 1870, and, by leave of court and consent of counsel, files the following amendment to his bill, to wit:

Circuit Court of the United States, District of Iowa.

THE IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES NAVIGATION & RAILROAD COMPANY *et al.*

The plaintiff, by leave of court and agreement of counsel, amends his description of the property in dispute by adding, after the first clause of the bill, the following words:

That said lands in dispute and claimed by the Des Moines Navigation & Railroad Company and its assignees are the odd sections in townships 86, 87, and 88, ranges 27, 28, 29, and 30 west, which lie south of the second correction line, within five miles of the Des Moines river, and townships 89, 90, 91, and 92, ranges 28 and 29, east of the Des Moines river, within five miles of the east branch thereof.

The lands to which the Des Moines Valley Railroad Company make some claim are the odd-numbered sections in townships 89 and 90, ranges 28 and 29, which lie west of the Des Moines river and within five miles thereof.

GRANT & SMITH.

The amendment, being made to correct and simplify a description of the lands in controversy, is conceded to be true without formal answer.

Part of the Answer of Wm. B. Wells, Defendant in said Suit.

28 United States Court, District of Iowa.

THE IOWA HOMESTEAD COMPANY, Complainant,

vs.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, and Others, Defendants.

The several answer of the defendant, Wm. B. Wells, to the bill of complaint of The Iowa Homestead Company, complainant.

* * * And this defendant, further answering, denies that the title of the complainant to the lands claimed by these defendants and by the Des Moines Navigation and Railroad Company and its grantees is superior and paramount to that of the said company and its grantees, and he expressly denies that the plaintiff, by reason of the matters in said complainant's bill of complaint contained as against the said Des Moines Navigation and Railroad Company and its grantees, has any title whatever to the said lands claimed by said company and its several grantees, respectively.

And this defendant, further answering, says that, as to whether or not the said complainant and its vendees have been in possession of and paid said taxes on the lands claimed by them since 1861, to the amount of $80,000, this defendant is ignorant and uninformed save by the said complainant's bill of complaint, but he expressly avers that the possession of the said lands by the said complainant and its vendees since 1861 is and has been unauthorized and wrongful, and that the said complainant should be required to account for
29 the use and rents and profits thereof to the property owners, respectively, during the time they have been in such possession, and he also expressly alleges and avers that all taxes whatever paid by said complainant have been paid by complainant voluntarily, with a knowledge of all the facts, and that the complainant is not entitled to have the same or any part thereof refunded.

And on this day, to wit, the 2d day of August, 1869, come the defendants, The Des Moines Navigation and Railroad Company, Samuel G. Wolcott, E. C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade, and John Stryker, by Ellwood, solicitor, and file in said cause the following answer to complainant's bill of complaint, to wit:

United States Circuit Court, District of Iowa. In Equity.

THE IOWA HOMESTEAD COMPANY, Complainant,

vs.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Edwin C. Litchfield, Electus B. Litchfield, William J. McAlpine, Richard B. Chapman, Edward Wade, and John Stryker, Defendants to the Bill of Complaint of the Iowa Homestead Company, Complainant.

These defendants, The Des Moines Navigation & Railroad Co., Samuel G. Wolcott, Edwin C. Litchfield, Electus B. Litchfield Wm. J. McAlpine, Richard B. Chapman, Edward Wade, and John Stryker, now and at all times hereafter, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or to so much and such parts and portions thereof as these defend-
30 ants are advised is material for them to make answer unto, answer and say that the foregoing and annexed answer of Wm. B. Wells herein, save as herein otherwise stated and set forth, truly and correctly sets forth all the facts and contains all the averments and allegations relied upon by these defendants and each and every one of them as a defense to the said complainant's bill of complaint; that the said answer of said Wells and the admissions and denials and affirmative allegations therein contained are true to the best knowledge and belief of these defendants, and that these defendants adopt the said answer of the said Wells as their answer to the complainant's said bill of complaint, save and except as herein otherwise stated and set forth.

And these defendants, further answering, allege and aver that all the lands in and by the complainant's bill claimed to be in dispute by and between the complainant and these defendants were, by the State of Iowa, duly granted and conveyed to the said Des Moines Navigation & Railroad Company *by the State of Iowa*, as in the said answer of the said Wm. B. Wells fully stated and set forth; and that subsequent to such conveyance by the State to said Des Moines Navigation & Railroad Company the said company bargained, sold, granted, and conveyed to these defendants, respectively, separate and distinct tracts and parcels of said lands claimed by complainant, as will more fully appear by reference to the deeds or conveyances executed by said company to these defendants, respectively, and to which several deeds, for greater certainty, these defendants pray leave to refer, and that each and every of these defendants is a *bona fide* purchaser under the State of Iowa of the tract or tracts, respectively, conveyed to him by said company, and that he has full, complete, and indefeasible title thereto.

And these defendants deny that the said complainant is entitled to the relief claimed in his bill of complaint or any part or portion thereof, and aver and insist that by reason of the matters
31 above and in the said answer of Wm. B. Wells, adopted and made a part thereof, contained the title of these defendants to the lands in dispute claimed by them, respectively, is perfect and absolute. All which matters and things these defendants are ready to aver, maintain, and prove as this honorable court shall direct, and they pray that their respective titles to the tracts claimed by them, respectively, may be confirmed and approved and declared valid, and that they be hence dismissed with their costs herein most wrongfully sustained.

FINCH & RIVERS AND
J. M. ELLWOOD,
Att'ys for Defendants Above Named.

And on the 13th day of May, A. D. 1870, there was filed in said cause the following stipulation of parties:

United States Circuit Court, District of Iowa.

THE IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, William B. Wells, Roswell S. Burrows, Edwin C. Litchfield, William J. McAlpine, Richard B. Chapman, Albert H. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, and Others.

It is stipulated and agreed that the joint and several answers of the defendants, Albert H. Tracy, Francis Tracy, and Harriet Tracy, verified by Albert H. Tracy; the several answers of the defendant, Wm. B. Wells, sworn to by said Wells, and the joint and several answers of the defendants, Samuel G. Wolcott, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Ed-

ward Wade, John Stryker, and the Des Moines Navigation & Railroad
Company, sworn to by Electus B. Litchfield and Nathan J. Hig-
32 bee, be deemed and taken as the answer of the several defend-
ants herein, and that all previous answers of the said defendants
verified by their solicitors and filed herein be withdrawn from file.

To the several preceding answers the plaintiff filed a formal replication, putting in issue the several averments therein contained.

Stipulations Between the Parties.

In the Circuit Court of the United States.

The Iowa Homestead Company
vs.
The Des Moines Navigation and Railroad Company.

It is agreed that the only questions submitted on this hearing are—

1. In which of the parties is the paramount title to the lands in controversy?
2. If the title shall be adjudged to be in the defendant, The Des Moines Navigation and Railroad Company, is the plaintiff entitled to be reimbursed the taxes which it has paid on the lands?

The amount of taxes paid is admitted to be $2,000. If the court shall find that the plaintiff is entitled to be so reimbursed, the question of amount to be reimbursed shall be referred to a master, and the defendants shall have the right to show any counter-claims or matters which should be considered as reducing the amount to be reimbursed.

It is admitted that D. W. Kilbourne was a director in the Des
Moines Valley Railroad Company from 1862 to 1867.
33 It is admitted that the Dubuque and Sioux City railroad
was completed to Sioux City July 4th, 1870.

GRANT & SMITH,
Attorneys for Plaintiff.
WITHROW & WRIGHT,
For D. M. N. & R. R. Co.
S. L. STRONG and
WITHROW & WRIGHT,
For D. M. V. R. R.
C. C. NOURSE,
For R. S. Burrows.

And afterwards, to wit, on the 31st day of May, 1871, the following decree was rendered in said cause by said circuit court:

The Iowa Homestead Company
vs.
The Des Moines Navigation and Railroad Company *et al.*

The cause came on to be heard at the May term, 1871, of said court, Grant and Smith for the plaintiff, and Ellwood, Nourse &

Withrow for the Des Moines Navigation and Railroad Company and purchasers, and Withrow & Strong for the Des Moines Valley Railroad Company; and the cause is heard upon the bill and amendments, answers, replications, agreements of counsel, exhibits, and depositions.

And thereupon it was ordered, adjudged, and decreed that the plaintiff's bill as to the lands in townships 86, 87, and 88, ranges 27, 28, 29, and 30, east and west of the Des Moines river and south of the second correction line, and townships 89, 90, 91, and 92, ranges 28 and 29, east of the Des Moines river, and the bill for the relief for indemnity lands in lieu thereof, be dismissed.

And the bill for relief as to the lands in townships 89 and 90 north, range 28 and 29 west, on the west side of Des Moines river, be dismissed without prejudice, and that the plaintiffs pay the costs. 34

The following agreement was filed in said cause by the parties on the 20th day of October, A. D. 1871:

THE IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY and Others.

It is agreed between the counsel for the complainants and defendants, who have appeared and answered, that the foregoing case was tried in the circuit court upon the bill, amendments, answers, replications, exhibits, and depositions offered by plaintiffs and defendants at and in the foregoing record, which the parties agree to examine and correct when printed.

It is further agreed that the plaintiffs have all the title to the property in dispute which lawfully belonged to the Dubuque & Pacific Railroad Company or Dubuque & Sioux City Railroad Company, its assignee.

It is also agreed that either party shall be authorized to read, either in the court below or in the supreme court, all acts, resolutions, and memorials, journals, or public documents of Congress or the State of Iowa which relate to the matter in controversy without offering them formally to the court, and use them in argument by proper reference.

It was also agreed that if either has omitted from their record any public record of the State or United States which relates to the matter in controversy the same may be read and considered in the appeal court by furnishing the adverse party with notice thereof thirty days before the argument, the object of both parties being to obtain a final adjudication of the questions made in the issues between the parties, or all the facts which belong to the same. And it is further stipulated that the defendants, Samuel G. Wolcott, 35 Edwin C. Litchfield, Edward Wade, and John Stryker, each and every of whom are citizens of New York, and the Des Moines Navigation & Railroad Company, duly appeared in this court and filed their joint and several answers to complainant's bill, duly verified; that the said answers are not now found with the papers in this cause; that the said answers of said defendants were substantially in all respects like those of the defendants, Wm. B. Wells and Albert Tracy, on file herein and duly verified by them, respectively, except such changes, variations, and alterations as were necessary to present the interests held by said defendants, respectively, in the land in this action.

And it is further stipulated and agreed that the said answer of defendant, William B. Wells, verified by him, with the necessary changes, alterations, and variations, to show and present the proper and respective interest of defendants, Samuel G. Wolcott, Edwin C. Litchfield, Edward Wade, and John Stryker and Des Moines Navigation & Railroad Company, shall be taken, treated, and deemed the answer of said last-named defendants herein.

J. M. ELLWOOD,
For all the Defendants Represented.
WITHROW & WRIGHT,
For all the Defendants they Represent, Except the Des Moines Valley Railroad Company.
GRANT & SMITH,
For Plaintiff.

In the Supreme Court of the United States.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION & RAILROAD CO. *et al.*

To prevent unnecessary incumbrance of the record in this cause it is stipulated that the evidence in the court below established the following facts:

36 That on the 27th day of April, 1863, there was certified to the State to aid in the construction of the Dubuque & Pacific railroad lands as follows:

	56,573.32 acres.	
	21,061.91 "	
	1,382.32 "	
		78,917.25
And the 13th December, 1864		159.60

That the land certified on the 27th day of December, 1858, embraced none of the lands in dispute in this controversy, and no lands lying in odd-numbered sections within five miles of the Des Moines river.

That the lists made on the 7th of April, 1863, and the 13th of December, 1864, embraced the lands in dispute, except indemnity lands, and all were in odd-numbered sections within five miles of the Des Moines river. * * *

(Signed) WITHROW & WRIGHT,
For the Des Moines Navigation & Railroad Company and the Des Moines Valley Railroad Company.
GRANT & SMITH,
For Plaintiff.

And on this day, to wit, the 13th day of May, in the May term, A. D. 1870, of said court, in the records of the proceedings thereof in said entitled cause there appears the following entry, to wit:

THE IOWA HOMESTEAD COMPANY, Complainant,

vs.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, *et al.*, Defendants.

This action was commenced in the district court of Webster
37 county, Iowa, at the October term of said district court. The defendants, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, filed their affidavit, bond, and petition asking the removal of this action from said district court to this court under the provisions of the act of Congress, approved March 2nd, 1867, entitled An act to amend an act for the removal of causes in certain cases from the State courts, approved July 17, 1866.

And it appearing to said district court that said Edwin C. Litchfield, Electus B. Litchfield, and John Stryker were non-residents of the State of Iowa and residents of the State of New York, and that their application for the removal of this cause to this court is in all respects conformed to the requirements of said act of Congress, the said district court, at the October term thereof, in the year 1868, made the usual order transferring and removing this cause to this court as to the defendants, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, and this cause as to said defendants — removed to this court for trial.

And it appearing that the defendants, Samuel G. Wolcott, Roswell S. Burrows, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, and Edward Wade, are each and every of them non-residents of the State of Iowa and district of Iowa, and under the statute above referred to are also entitled to a removal of this cause from the State court, and that said defendants, with the express consent and approval of the plaintiff, have appeared and answered the bill herein and asked to be made parties defendant, and that their rights may be heard and determined in this court and on the trial of this action;

And it further appearing to this court that the defendants so asking to be made parties claimant hold under the same title as the defendants, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, their defence is in all respects identical, with the said plaintiff consenting, it is ordered that said Samuel G. Wolcott, Wm.
38 B. Wells, Roswell S. Burrows, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, and Edward Wade, and each and every of them, be made parties defendant herein; that the answer filed by said persons be taken and deemed their answer to the complainant's bill, and that by their appearance and answer herein the said persons be deemed and treated

as defendants herein and their rights in the premises adjudicated in and by this court in this action.

The following portions of the printed record in case of Edwin C. Litchfield *vs.* The County of Webster *et al.*, in the United States circuit court, district of Iowa, were put in evidence by the defendant Litchfield under stipulation therefor in the agreed statement of facts and stipulations filed herein, being parts of Exhibit D, thereto attached:

Evidence. Stipulation.

In the United States Circuit Court, District of Iowa.

EDWIN C. LITCHFIELD, Complainant,
vs.
THE COUNTY OF WEBSTER, in the State of Iowa, and JONATHAN HUTCHINSON, Treasurer.

It is hereby stipulated that the following shall be taken as a correct and true statement of facts in the above-entitled cause for the purposes of this suit, and as such accepted and treated as evidence, subject to the right of exception thereto by either party for incompetency, immateriality, or irrelevancy.

10th. From the time of the decision of the Supreme Court of the United States in the case of Litchfield *vs.* The Dubuque & Pacific Railroad Co., which decision is made part hereof, until the 39 9th day of May, 1868, the executive officers and agents of the United States asserted and held that all of said lands in question, under and by virtue of said act of Congress of May 15, 1856, passed to and became the property of the State of Iowa, or of said Dubuque & Pacific Railroad Co., and on the demand of the State, on or about April 7, 1863, the same were certified and approved to the State of Iowa under said railroad grant of May 15, 1856, as follows:

"GENERAL LAND OFFICE, *Feb.* 26, 1863.

"I, J. M. *Edwards*, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages 1 to 4, inclusive, is a true and correct list of the tracts of land within the 6-mile limits, granted to the State of Iowa by the act of Congress approved the 15th of May, 1856, entitled 'An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State, being the vacant and unappropriated lands in the alternate sections designated by odd numbers, for six sections in width on each side of the railroad, 'from the city of Dubuque to a point on the Missouri river near Sioux city, with a branch from the mouth of the Tete Des Mortes, to the nearest point on said road,' known as the Dubuque and Sioux City (late Dubuque and Pacific) railroad, within the State of Iowa, and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of said act of the 15th of May, 1856, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

"In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first above written.

"[L. S.] (Signed) J. M. EDMUNDS,
"*Commissioner of the General Land Office.*"

40 "DEPARTMENT OF THE INTERIOR, *April* 7, 1873.

"Approved, subject to the rights and conditions above mentioned.

"(Signed) J. P. USHER, *Secretary.*"

"GENERAL LAND OFFICE, *April* 11, 1863.

"I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the annexed pages, one to three, inclusive, *is* a true and literal exemplification of the original approved list on file in this office.

"In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

"[L. S.] (Signed) J. M. EDMUNDS,
"*Commissioner General Land Office.*"

A similar certificate of same date was given for the lands between the 6-mile and 15-mile limits of said railroad line; and said railroad company, by itself and its grantees, continued to claim the same continuously until the decision of the Supreme Court of the United States in the cases of Williams *vs.* Baker and The Iowa Homestead Co. *vs.* The D. N. & R. R. Co. in the year 1872, which decisions are part hereof.

11th. After the decision of the Supreme Court of the United States in the case of Wolcott *vs.* The D. N. & R. R. Co., reported in 5 Wallace, page 681, decided at the December term of said court, 1866, and made part of this statement, the executive officers of the United States having the charge and control of the public lands held and decided that all of said lands belonged to the United States and were part and parcel of the public domain and subject
41 to pre-emption and homestead entry under the laws of the
United States, and for some time thereafter the register and receiver of the United States land office in the said county of Webster, at Fort Dodge, under the direction, instruction, and ruling and decision of the Commissioner of the General Land Office, and of the Secretary of the Interior, held that said lands were subject to preemption and homestead entry, and allowed homestead and preemption entries to be made on some of said lands. Many of the most valuable tracts of said lands were, under such ruling and instruction by such register and receiver, allowed to be pre-empted and homesteaded some time after the said Wolcott decision, and complainant has been compelled to commence and prosecute suits in the courts of this State and of the United States to set aside and remove the cloud thereby created upon his title.

12th. After the decision of the supreme court in said case of Litchfield *vs.* The Dubuque & Pacific R. R. Co. the said railroad company claimed to be the owner of all of said lands within fifteen miles of the line of their road, and so claiming the ownership thereof sold and conveyed many tracts of the same to numerous parties, and said county of Webster collected taxes for county and State purposes from them thereon, and continued so to do until after said decisions of the Supreme Court of the United States in the year 1872, but said lands were at all times assessed as non-resident lands, so entered on the tax-book of said county, and the taxes received of any party who would pay the same, and receipts given to and in the name of the parties paying the same.

33d. Under the act of August 8th, 1846, lands above the Raccoon Forks were certified and approved to the State of Iowa as part of the so-called river grant, as follows:

October 30, 1851	81,707.93	acres
March 10, 1852	143,908.37	"
December 17, 1853	33,142.43	"
" 30, 1853	12,813.51	"

42 And all of the lands in controversy are embraced in the lands so certified and approved.

34th. That said certification and approval of said lands in April, 1863, as railroad lands, under the act of May 15, 1856, still remain in the possession of the State of Iowa, and have never been cancelled by the United States.

35th. All the lands claimed by complainant and other grantees of the D. N. & R. R. Co., under the so-called Des Moines river grant, are lands in place, and all of the indemnity lands provided by the act of Congress of July 12, 1862, have, with the consent of the United States, been conveyed by the State of Iowa to the Des Moines Valley R. R. Co.

WRIGHT, GATCH & WRIGHT,
Sol'rs for Complainant.
JOHN F. DUNCOMBE,
Attorney for Defendants.

Deposition of John Browne.

Question. State whether or not from the years 1859 to 1866, both inclusive, Webster county, its officers or agents charged with the collection of its revenues, claimed that the taxes were due and payable from complainant or other claimants of the lands in controversy under the so-called river grant for any of the years named, or made any effort, by advertising the lands for sale or otherwise, to enforce payment; and, if not, state as fully as you can the reason why, and if the taxes were not paid by complainant or other claimants of said lands under said river grant for said years or any of them state as fully as you know the reason why they were not.

Answer. From the year 1860, after the decision in the case of Litchfield *vs.* The Dubuque and Pacific R. R. Co., until the year 1867 the title to the lands in controversy was so unsettled and involved in so much uncertainty that the treasurer and other officers

of Webster county deemed it inexpedient and unsafe to
43 offer the same for sale for delinquent taxes or otherwise seek
to enforce payment. During all of the time named this was the settled policy and practice of said county in that respect. On the 21st day of September, 1860, E. G. Morgan, then treasurer, sent to the witness, as agent for Litchfield and other owners of said lands, a letter, a copy of which is hereto attached, marked Exhibit A, and made a part of this answer. On the 17th day of June, 1860, Jonathan Cattell, then auditor of the State of Iowa, as such auditor addressed a letter to the then treasurer of Hamilton county as to the proper course to be pursued in respect to the same description of lands in that county, a copy of which letter is hereto attached, marked Exhibit B, and made part of this answer, and said Cattell, as such auditor, addressed a circular letter in substance the same to the treasurers of other counties in which lands of the same description were located. The instructions therein contained continued to be acted upon after the decision in the case of Wolcott *vs.* The Des Moines Navigation and R. R. Co. in 1866 in all of the counties in which any of the so-called river lands were located, and none of those lands were sold for taxes during any of said years excepting through inadvertence, and when so sold in Webster county in some instances the sales were cancelled by the county on its own motion and the purchase-money refunded to the purchaser. During all of the time named the title to all the lands known as the river lands, and also embraced within the limits of the so-called railroad grant, was regarded by complainant, as well as persons generally conversant with the conflicting claims thereto, as being so uncertain as to render it extremely hazardous and imprudent to pay the taxes thereon, and such uncertainty was the reason the taxes were not paid. The only reason why complainant discontinued payment of taxes thereon was the decision in the case of Litchfield *vs.* The Dubuque & Pacific R. R. Co., and he had commenced paying the taxes on said land for the year 1859 when first advised of such decision and discontinued payment solely
44 on account thereof immediately after the decision in the case
of Wolcott *vs.* The D. N. & R. R. Co., reported in 5th Wallace, page 681, and regularly thereafter he paid the taxes for 1866 and subsequent years. After the decision in Litchfield *vs.* The Dubuque & Pacific R. R. Co. the lands in controversy within the limits of the railroad grant ceased to be regarded by the said county and its treasurer and other officers as claimed under the river grant, and from that time until the decision in the case of Wolcott *vs.* D. N. & R. R. Co. said county and its officers and the citizens of Webster county generally acquiesced with the agents and officers of the United States and the State of Iowa in considering and treating the said lands as having passed to said State under the railroad grant of May 15, 1856, and the certificates issued to the State under that grant in April, 1863. Accordingly, the claimants under said last-named grant, after the issuance of such certificates in the year 1863, commenced to claim ownership to said lands and to pay the taxes on the lands in controversy, which the treasurer of said county received, knowing the same to have been paid under said railroad grant. From the

time of the decision in the case of Litchfield *vs.* The Dubuque & Pacific R. R. Co. until the time of the decision in Wolcott *vs.* The D. N. & R. R. Co. the complainant and other claimants under the river grant did not understand that the county of Webster claimed that any of the lands in controversy were subject to taxation prior to their certification under the railroad grant in April, 1863, but, on the contrary, understood that the county did not so claim, and during all of the period aforesaid the United States, by its land officers, and the State of Iowa and the county of Webster and the claimants under the railroad grant of 1856 all claimed that the title passed to the State only by the certificate of April, 1863.

Q. State whether or not complainant, after said decision in the case of Wolcott *vs.* The D. N. & R. R. Co., made any effort to settle with Webster county for the taxes in controversy or any of the same; if so, state whether or not such effort was made at
45 different times, and all that was said and done at each time
with respect thereto; what tenders or offers, if any, were made by or for complainant; what proposition or offers, if any, were made by the county, and with what result. State fully.

A. In 1867, after the Wolcott decision, in behalf of Litchfield and other owners, I offered to pay the county all the taxes claimed to be delinquent from the year 1859 to 1866, inclusive, without any interest or penalty thereon, such payment to be in full for the amount claimed by the county. We claimed the taxes to be illegal, and our offer was made by way of compromise and to remove the cloud by reason of the taxes being on the books of the county. This offer the county rejected. In the spring or summer of 1868 I offered to pay the taxes of 1862, 1863, 1864, 1865, and 1866, with interest at six per cent., which the county rejected, except on condition that the taxes of 1859, 1860, and 1861 should also be paid at the same time. At other times, in 1869 and subsequently, other offers were made to the county with a view of compromise, all of which were rejected. In October, 1870, the board of supervisors passed a resolution authorizing the treasurer to receive the taxes, except State taxes of 1859, 1860, and 1861, assessed and unpaid, with ten per cent. interest yearly, upon the terms stated in the resolution, a copy of which is marked No. 14 of documents in proof, but leaving the taxes of 1862, 1863, 1864, and 1865 to be paid with the penalty interest as claimed by the county. These were the only terms upon which the county at that time would receive payment. In April, 1872, an effort was again made toward a settlement or compromise, and at that time the board of supervisors passed a resolution authorizing the treasurer to receive the taxes of 1859, 1860, 1861, and 1862, with six per cent. interest, and the taxes of 1863, 1864, 1865, and 1866, with ten per cent. interest, upon the terms stated in the resolution, a copy of which is marked No. 15 of documents in proof, and expressly refused to accept payment on any other terms. Subsequently the time of payment named in that resolution was extended to
46 April 1, 1873. In March, 1873, I went to the office of the
treasurer of Webster county to give him a list of all of the lands now in controversy, and offered to pay the amount due on

them for the taxes of 1862, 1863, 1864, 1865, and 1866, and asked the treasurer to take the pay and make out the receipts for the same, and the treasurer said he would do so as soon as possible. The list was a long one and would require labor and time to make out the receipts, which he said would be ready in some two or three weeks, and requested me to come again for them. Within two or three weeks I went with the money to pay for the receipts of the taxes for the years named, and again offered to pay the same; but the treasurer then declined to accept the payment of the taxes of 1862, 1863, 1864, 1865, and 1866, except upon condition that I should also pay the taxes of 1859, 1860, and 1861. He also said he had commenced making out the receipts for 1862 to 1866, inclusive, and had them partly completed when the supervisors or the auditor had come to his office and told him not to accept the taxes of 1862 to 1866, except the taxes of 1859 to 1861, inclusive, were also paid at the same time. I had the money there ready to pay and offered to pay, and the treasurer made no objection to my offer or tender of the money, except that he refused to receive the taxes of 1862 to 1866, unless the taxes of 1859 to 1861, inclusive, were paid at the same time, such being the order of the board of supervisors.

Q. State what the fact is as to trespasses and waste having been committed on the lands in controversy during the pendency of the conflicting claims of title thereto. If trespasses and waste were committed during that time, state, as nearly as you can, the extent of the damage thus occasioned to the lands, and how you were prevented by the uncertain state of the title from protecting the lands against the same.

A. In consequence of the dispute of the title we were unable to
protect timber lands from trespass and waste. Our title being
47 denied we were unable to maintain prosecution for trespass in
the courts. I think the area covered by the trespass and waste committed on the lands in controversy would amount to 9,000 acres, and the damage at a low estimate, in my opinion, covered by such trespass and waste would amount to at least $90,000. The railroad company sold large portions of the timber lands, and their grantees again sold large portions of them. During their assumed ownership large quantities of timber were removed from the lands for railroad construction purposes, such as ties and bridge material, and during such claim of ownership and until after the Wolcott decision we were unable to maintain any suit against them.

Q. Do you know or can you set forth any matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. Of the lands in controversy not less than twenty thousand (20,000) acres were entered as homestead and pre-emption claims by about two hundred different parties, as shown by list No. 29 of documents in proof. Under the rulings of the Secretary of the Interior and other executive officers and agents of the United States they were held by the land officers of the United States to be public

lands, and as such subject to pre-emption and homestead entry. The parties so entering the same went into possession, and except in cases where they have been dispossessed by actions of right, prosecuted by the claimant at great expense, still hold and refuse to surrender possession thereof. Uniformly in such actions of right complainant has been found to be the rightful owner without any resistance on the trial on the part of the defendants, but in every instance where the defendants have made any improvements
48 they have claimed and been allowed compensation therefor, under the occupying claimant laws, upon the holding of the courts that their possession was under color of title and their improvements made in good faith.

Of the lands above Des Moines embraced in the river grant the title of the Des Moines N. & R. R. Co. and its grantees to over 200,000 acres was denied by the decision of the Secretary of the Interior and the orders of the Land Department of May, 1868. After said decision and rulings nearly all of these lands were allowed to be pre-empted as public lands by the local land officers at Des Moines and Fort Dodge. Squatters were permitted to go on them, file declaratory statements, and paid the registers and receivers of the local land offices the regular fees for such filings. At least one hundred thousand (100,000) acres were so pre-empted in the land district of Fort Dodge and a like amount at the Des Moines land offices. In some instances patents were issued as late as the summer or fall of 1868. After the issuance of Wilson's order in May, 1868, declaring these river lands to be public lands and subject to entry, for the purpose of stopping the allowances of such entries and giving these squatters color of title, I obtained from Judges Miller and Love temporary injunctions staying such entries, but at the October term of 1868 said temporary injunctions were dissolved by Mr. Justice Miller on the ground that these local land officers, in allowing such homestead and pre-emption entries, were acting within the discretion conferred upon them by law, and that the courts would not interfere with the executive officers of the United States while exercising such discretion, and upon appeal to the Supreme Court of the United States from such decision the decision was affirmed, and is reported in 9 Wall., 575.

Cross-examination:

Q. Is it not true that the lands in controversy in this case were advertised for 1860, 1863, 1864, 1865, and 1866, and a part of the lands for 1862 by the treasurer of Webster county for sale for
49 taxes, and that the only years in which they were not advertised were the years of 1859 and 1861?

A. On examination it appears that the lands were not advertised for the years 1859 and 1861, and only a few tracts were advertised for 1862. They were advertised for the year 1860, and part of them in 1862, 1863, 1864, 1865, and 1866, the advertisement being made in the years succeeding each of the years mentioned. Although advertised for these years, very few tracts were sold.

Q. In your direct examination you state that in some instances the sales were cancelled by the county on its own motion, and the purchase-money refunded to the purchasers. Can you name any of the particular cases in which this was done?

A. Yes, sir; George W. Bassett, Elias A. Scott, Michael McNamara, and —— Maney, who lived on section 7, 89, 28. There were others, but I cannot name them at this moment.

Q. Was the money refunded in any case, to your knowledge, except where a patent had been issued by the Government of the United States to the settler on the land?

A. I only recollect one instance where the patent had been issued, and that was the case of Elias A. Scott.

Q. Explain all the reasons why you state that the treasurer of that county knew that all the taxes paid were paid under the title claimed by the railroad grant.

A. Because the taxes on the great body of the lands were paid by the railroad company, as shown by stubs, and the fact of the receipts having been taken by Mr. Sargent, who was the agent of the railroad company, and only a few were paid by settlers.

50 EXHIBIT A.

"Erastus G. Morgan, treasurer and recorder of Webster county.

"FORT DODGE, IOWA, *Sept.* 21, 1860.

"J. Browne, Esq.

"DEAR SIR: Yours of the 17th inst. was rec'd, and in reply would state that the lands *to* which the Des Moines Nav. & R. R. Co. claim to own are not advertised for sale, but remain on our tax-book. The clerk has been ordered to put them on the book for the present year. They will not be advertised until the title is adjusted.

"Respectfully yours, E. G. MORGAN,
"Per E."

EXHIBIT B.

"AUDITOR'S OFFICE, IOWA,
"DES MOINES, *June* 14, 1860.

"Geo. Shepp, Esq., treas. Hamilton Co.

"DEAR SIR: Yours of the 9th inst. is received. After looking over the law and the questions propounded, and consulting Attorney General Rice, we conclude that it would be setting a bad precedent not to offer the town property at the tax sales, and that, being assessed as town lots, it would not be proper or safe to sell as land by subdivision. This could not be done, at any rate, when the tax had been paid on any lots in a parcel or description. Hence it is better to sell as town property, but they should be described in as short a manner as possible to be explicit. It would be entirely right to include all unpaid lots in any one block in one description belonging to one person, or if owner be unknown.

"We conclude, in view of the questions as to the so-called river lands, and the further question as to their being liable to tax, that it would be best not to offer them for sale for taxes until these mat-

ters are determined or adjusted in some manner. There are
51 two questions in regard to them: Firstly. Has the State any
title to them under the river grant, which it is reported has been decided in the negative, but of which we have no official information? 2d. Whether they are taxable prior to 1859 as the property of the river company or their grantees.

"This last question I thought had been decided by our courts, but learn from Attorney General Rice that there is some doubt about it. Upon the whole, it is thought best not to sell them at present, lest it may lead to unnecessary trouble and expense.

"Yours truly,
"(Signed) J. W. CATTELL,
"*Auditor of State.*"

Documentary Evidence.

1] "DEPARTMENT OF THE INTERIOR,
"WASHINGTON, *April* 10, 1862.

"SIR: In answer to your communication of the 18th March last, making certain inquiries respecting the proper disposition of lands in Iowa, granted to the State by act of Congress of 15th May, 1856, and by joint resolution approved March 2, 1861, I am of the opinion that they are to be disposed of as said act and resolution directs without any regard to act of August 8, 1846, referred to in your letter.

"It appears that the action of this Department in construing the last-named act has been in no respect uniform, not sufficiently so to form a precedent for its present direction; and if it had there are now other considerations which will control its action. The Supreme Court has decided, in the case of the Dubuque & Pacific Railroad Company *vs.* Litchfield (23 Howard, page 66) that the act of 8th of August, 1846, did not cede any lands to the State above the Raccoon Forks, and the before-mentioned joint resolution declares that the lands above the Raccoon Forks were improperly certified as a portion of the grant of 8th August, 1846.

52 "It follows, then, that such of those lands as are embraced
in the act making the railroad grant, approved May 15, 1856, are to be disposed of according to the terms of that act, and that without any regard to the fact of their having been certified under the act of August 8, 1846.

"After completely satisfying the demands of the State embraced by that act, so much of the residue of the lands north of the mouth of Raccoon river as were certified under the supposed grant of August 8, 1846, and which the State of Iowa had sold to *bona fide* purchasers prior to the 2d March, 1861, will be also certified to the State of Iowa.

"The act of 15th May, 1862, granting to the State for railroad purposes except such lands as the rights of pre-emption have attached thereto. This last remark is made because it affects the case of Crilly and may be others claiming pre-emption on said lands.

"Very respectfully, your obedient servant,
"CALEB B. SMITH, *Secretary.*

"To the Commissioner of the General Land Office."

2] "GENERAL LAND OFFICE, *April* 15, 1862.

"SIR: I have the honor to enclose a copy of the decision of the Secretary of the Interior, of the 10th inst., in the case submitted to the Department in our letter of the 18th ult., a copy of which was furnished you in a letter of the same date.

"Pursuant to said decision it is proposed to make out the list of lands coming to the State for railroad purposes under act of 15th of May, 1856, in so far as the six and fifteen mile limits of certain routes under that grant traverse the region which had been claimed by the State of Iowa under the act of 8th August, 1846, for the Des Moines river improvement above the Raccoon Forks, irre-
53 spective of the certified lists to the latter, which are held to be invalid under the decision of the Supreme Court of the United States at its December term, 1859.

"With great respect, your obedient servant,

"J. M. EDMUNDS,
"*Commissioner.*

"Hon. J. W. Grimes, U. S. Senate."

3] "EXECUTIVE OFFICE, IOWA, *May* 6, 1862.

"J. M. Edmunds, Commissioner General Land Office, Washington D. C.

"SIR: Yours of the 15th April last covering copy of decision of Secretary Smith in regard to the effects of the grants of land made to this State by the acts of August 8, 1846, and May 15, 1856, is at hand.

"A portion of these lands was once certified to this State as school lands, and the certificate subsequently set aside because the Department decided them to be covered by the act of August 8, 1846.

"They were then certified to the State under the last-named act, and now that certificate is set aside because the lands were not covered by that act. They are now decided to be covered by the act of 1856. This State has sold portions of these lands as school lands and as lands coming to the State under the act of 1846, and the title of many grantees of the State are involved in the present decision. I understand the question will again be brought before the Supreme Court of the United States, and my principal object in writing you is that this State may not lose her equitable claim for reclamation on the United States in case the State suffers loss by reason of the failure of the title conveyed by this State under certificate of the United States.

"Very respectfully, your obedient servant,

"SAMUEL J. KIRKWOOD."

54 4] "GENERAL LAND OFFICE, *June* 26, 1862.

"SIR: The attention of this office has been called to the condition of the lands in the region of the Des Moines river, above the mouth of the Raccoon Forks, which were claimed by the State of Iowa under the act of the 8th of August, 1846, for the improvement of said river.

"1st. The act of 1846, by the decision of the Supreme Court of the United States at its December term, 1859, is restricted to the lands lying below the mouth of the Raccoon Forks, and the claim of the State to all lands lying above that point as abnegated.

"2d. Under the decision of the Supreme Court the Secretary of the Interior has held that the alternate odd-numbered sections falling within the 6 and 15 mile limits of the railroads, where they traverse the region of the Des Moines river above the mouth of the Raccoon Forks thereof, would enure to the State under the act of 15th of May, 1856, to aid in the construction of said roads.

"3d. The joint resolution of Congress of the 2d March, 1861, declares 'that all the title which the United States still retain in the tracts of land along the Des Moines river, and above the mouth of the Raccoon Forks thereof, in the State of Iowa, which have been certified to said State improperly by the Department of the Interior as part of the grant by Congress, approved August 8, 1846, and which is now held by *bona fide* purchasers under the State of Iowa, be, and the same is hereby, relinquished to the State of Iowa.'

"To enable us to properly act in the matter, in view of the aforesaid decision and resolution, I have to request that you will furnish this office with the list of tracts of lands therein referred to 'held by *bona fide* purchasers of the State of Iowa' on the 2d March, 1861, certified under official seal, specifying in each case the date of
55 sale, name of purchaser, consideration, and date of patent or deed of conveyance by the State, with all the essential particulars connected with the transaction. This information is requested at your earliest convenience.

"Very respectfully, your obedient servant,

"J. M. EDMUNDS,
"*Commissioner*.

"To his Excellency Governor of Iowa, Des Moines, Iowa."

5] "GENERAL LAND OFFICE, *Jan'y* 27, 1862.

"GENTLEMEN: Mr. George Crilly claims pre-emption to the S. E. qr. 29, T. 89, R. 28 W., in virtue of settlement commenced in 1855. In 1852 a list was certified to the State of Iowa upon certain lands under the Des Moines grant of 1846. The ruling of the Supreme Court at December term, 1859, is against that grant above the Raccoon Forks, where the tract above mentioned is located.

"Irrespective of the claim the pre-emption claim falls to the ground by reason of the settlement having been made whilst there was an outstanding title from the United States under color of the act above mentioned.

"Respectfully, your ob'd't servant,

"J. M. EDMUNDS,
"*Commissioner*.

"Register and receiver, Fort Dodge, Iowa."

6] "GENERAL LAND OFFICE, *April* 22, 1862.

"GENTLEMEN: The case of George Crilly, in which he claimed the right to enter the S. E. qr. sec. 29, t'p 89, range 28 W., at Fort Dodge

land office, was carried by appeal to the Secretary of the Interior
from the adverse decision of this office, and on the 10th inst.
56 the Secretary reversed the decision of this office and decided
that 'If the facts supporting a pre-emption claim are established to the satisfaction of the local officers, Mr. Crilly should be permitted to complete his entry,' there being no legal impediments to debar his right.

"You will, therefore, notify Mr. Crilly of the decision, and call upon him for the proof pursuant to the aforesaid decision.

"Respectfully, your obedient servant,

"J. M. EDMUNDS,
"*Commissioner.*

"Register and receiver, Fort Dodge, Iowa."

7] "GENERAL LAND OFFICE, *May* 9, 1862.

"GENTLEMEN: I transmit to you herewith three supplemental lists of lands, which appear to be vacant and unappropriated, in the odd-numbered sections within the six and fifteen mile limits of the Dubuque & Sioux City (late Dubuque & Pacific) railroad and the Cedar Rapids & Missouri River (late Iowa Central Air Line) railroad, and which enure to the State of Iowa under the act of May 15, 1856, for railroad purposes, to wit:

"For the Dubuque & Sioux City (late Dubuque & Pacific) road:

List No. 1, 6-mile limits, cont'g	56,952.92 acres.
List No. 2, 15-mile limits, cont'g	20,425.91 acres.
	77,378.83 acres.

* * * * * * *

"These lands are within the aforesaid limits of said roads, where they traverse the Des Moines river improvement grant above the Raccoon Forks, as claimed by the State of Iowa under the act of 8th of August, 1846, which claim was abnegated by the decision of the Supreme Court of the United States at the December term, 1859, and will now enure to the State under the aforesaid act of 15th May, 1856,
to aid in the construction of said road.
57 "You will carefully compare the lists with the plats and
records of your office and report to this office as soon as practicable any interferences that may be found to exist therewith, giving the name of the purchaser or locator and the number and date of the conflicting entry or location.

"As all the vacant lands within the six-mile limits in the odd-numbered sections will fall to the State, you will report all such tracts as may have been omitted in the list of lands within said limits.

"In making your examination great care must be observed in order that your report may embrace all the interferences and omissions and serve as a correct basis for the final adjustment of the grant.

"You will return the lists with your report to this office.

"Very respectfully, your ob'd't serv't,

"J. M. EDMUNDS,
"*Commissioner.*

"Register and receiver, Fort Dodge, Iowa."

8] "GENERAL LAND OFFICE, *June* 12, 1862.

"SIR: In reply to your letter of the 2d inst., I have to inform you that the lands to which you refer as having been approved to the State of Iowa under the 8th section of the act of September 4, 1841, and which approval was rescinded for conflicting with the grant of 1846, for the improvement of the Des Moines river were not included in the railroad lists which were transmitted, for the reason that the State still claims those lands under the act of 1841, the conflicting claim under the act of 1846 having been abnegated by the decision of the Supreme Court of the United States at its December term, 1859. Therefore the tracts in question will
58 remain in their present condition and be withheld from sale
or other disposition until you are otherwise instructed by this office.

"Very respectfully, your obedient servant,

"J. M. EDMUNDS,
"*Commissioner.*

"Register of the land office, Fort Dodge, Iowa."

"GENERAL LAND OFFICE, *April* 18, 1863.

"Register and receiver, Fort Dodge, Iowa.

"GENT.: I transmit herewith three certified transcript lists of lands in your district inuring to the State of Iowa for railroad purposes under the act of the 15th May, 1856, and approved to said State by the Secretary of the Interior on the 7th inst., viz:

"List No. 33. 6-mile limits of the Dubuque & Sioux City railroad, containing	56,473.32
"List No. 34. 15-mile limits of same road	21,061.91
"List No. 38. 15-mile limits of the Iowa Central Air Line railroad	13,470.96
"Total acres	91,006.19

"You will please acknowledge the receipt of said lists.

"Very respectfully, your obedient servant,

"J. M. EDMUNDS,
"*Commissioner.*"

10] "GENERAL LAND OFFICE, *Oct.* 6, 1863.

"GENTLEMEN: The location of the N. W. qr. sec. 33, T. 89, R. 28, on W. 99,769, by Hannah Riley, has been approved and will be carried into patent in the order of its filing. The land thus approved lies within the 6-mile limits of the Dubuque & Sioux City railroad, and the right thereto has been contested on the ground that the land was not liable to settlement, the same being within the limits of the grant for the improvement of the Des Moines river. This objection is not deemed valid, as the grant
59 for the river improvement did not extend to this land; con-

sequently the refusal of the register to allow claimants to file declarations for lands thus situated was erroneous.

"Respectfully, your obedient servant,

"J. M. EDMUNDS,
"*Commissioner.*

"Register and receiver, Fort Dodge, Iowa."

11] "GENERAL LAND OFFICE, *Nov.* 6, 1863.

"Register land office, Fort Dodge, Iowa.

"SIR: Your letter of the 27th ult. is received, and we note your remarks in reference to the river list, and in reply respectfully state that said list was intended to include all of the odd-numbered sections and parts of sections in place within the limits of the grant, and which *has* not been sold or otherwise disposed of by the United States.

"The railroad-grant act of 1856, of course, covers the odd-numbered sections within the limits of the railroad grant and inside of the river grant.

"The lands in the odd river lists certified to the State under act of 1846, which are not interfered with by the railroad grant and by sales and grants of swamp and university lands, it was thought proper to embrace in the new list under act of 1862, notwithstanding the title to them was confirmed by the joint resolution of 1861.

"Of the last-mentioned lands our records show about 58,000 acres.

"Very respectfully, your obedient servant,

"J. M. EDMUNDS,
"*Commissioner.*"

60 12] "GENERAL LAND OFFICE, *March* 29, 1864.

"Register and receiver, Fort Dodge, Iowa.

"GENTLEMEN: Your letter of the 8th inst. has been received, with enclosed warrants No. 6530 and No. 101,456, 160 acres each, act of 1855, and additional proof in the case of Elias Mercer, Lucius W. Hart, and Jonas Peterson. Mr. Mercer's entry of the E. ½, N. E. ¼, sec. 9, T. 87 N., R. 27 W., and Mr. Peterson's location of Wt. No. 101,456 on the N. W. fr. ¼, sec. 7, t'p 88 N., R. 28 W., have been this day approved and filed for patenting.

"Mr. Hart's location of Wt. No. 6530 on the W. ½ of N. W. ¼ and W. ½, S. W. ¼, sec. 21, t'p 88 N., R. 28, has also been approved, but cannot be patented until the land, a part of which has heretofore been approved to the State for railroad purposes, shall be released by the Governor. The Governor was notified of the decision of this office in Hart's case by letter of the 3d ult. In reply the register of the State land office says the Governor is not now authorized to execute such a release, but undoubtedly will be by the action of the Legislature now in session, and adds that all lands which have been improperly approved to the State will thereupon be relinquished. Whenever this is done the patents will immediately issue to the rightful claimants.

"Respectfully, JOS. S. WILSON,
"*Acting Commissioner.*"

Copies from Journal of Board of Supervisors of Webster County.

13] "November 11, 1863.

"In the matter of remitting the taxes heretofore assessed on the river and railroad lands in this county, the committee appointed to investigate the subject made a verbal report in detail, which report was accepted and the committee discharged, when the following resolution was passed:

61 "Resolved, That, in the opinion of this board, it is deemed inexpedient to remit any taxes heretofore assessed or collected upon any of the river, company, or railroad land grants situated in this county, the title to all or at least a part of said lands being unsettled, in our opinion."

14] "October 19, 1870.

"On motion, the original resolution was amended and adopted as follows:

"The treasurer of Webster county is hereby authorized to receive the principal, with ten per cent. interest per annum, of the delinquent tax for the years 1859, 1860, and 1861 now charged on the tax-books on the odd sections along the Des Moines river known as river lands, provided said taxes shall be discharged within a reasonable length of time from the passage of this resolution, except as to State taxes of all kinds; and the parties paying the same waive all claims for redress or action against the county at any time and all informalities of the levy of any of said tax."

15] "April 6, 1872.

"Mr. Beecher then moved the following resolution, to wit:

"Resolved, That the treasurer of Webster county, Iowa, be, and he is hereby, authorized to receive the taxes and to cancel all delinquent taxes standing upon the tax-book of Webster county, Iowa, against the real estate and personal property of said county for the years 1858, 1859, 1860, 1861, and 1862, and give receipts in full upon the receipt of such a sum as shall be equal to the original amount of tax due upon said lands for said years, together with interest thereon at the rate of six per cent. per annum from the date said tax first became due to the date of payment, and that the treasurer be, and he is hereby, authorized to receive the taxes and cancel all delinquent taxes standing upon the tax-books of Webster county, Iowa, against the real and personal estate of said county for 62 the years 1863, 1864, 1865, 1866, 1867, 1868, 1869, and 1870, and give receipts in full therefor upon the receipt of such a sum as shall be equal to the original amount of tax due upon said land for said years, together with interest thereon at the rate of ten per cent. per annum from the date when said tax became due to the date of payment:

"Provided, however, That all persons accepting of the terms of the above resolution are understood to and do by the acceptance of the terms thereof agree to waive all objections to the manner and legality of the assessment and levy of said taxes and to the amount of the same: And provided further, That the terms of this resolution be complied with and taxes paid within one hundred days from the date of the passage of this resolution.

"It is also agreed that any person accepting this proposition shall pay and clear up all the delinquent tax against the said property.

"Mr. Crandall moved to amend by striking out the year 1870. The yeas and nays being called for resulted as follows, to wit: Yeas, Crandall; nays, Brown, Beecher, Pratt, and Landen.

"Mr. Pratt moved to amend by striking out one hundred and inserting ninety days. Adopted.

"The original motion as amended was then adopted."

16] "NOVEMBER SESSION, 1872.

"Mr. Beecher offered the following resolution, to wit:

"Resolved, That the resolution of instruction to the treasurer passed at the April session, 1872, relating to the payment of delinquent taxes be extended to April 1, 1873. Adopted.

"J. B. SCOTT,
"*County Auditor, Webster Co., Iowa.*"

17] "The following preamble and order in reference to the land of E. A. Scott was passed and adopted by the board, viz:

63 "Whereas the southwest quarter of the southwest quarter and lots five (5) and six (6) of section No. (17), in township No. eighty-seven (87) north, of range No. twenty-seven (27) west, of the 5th P. M., Iowa, was, on the first day of April, A. D. 1863, entered in the United States land office, and has been since patented to Elias A. Scott by patent dated May 5, 1863; and

"Whereas the said land has been assessed prior to that time, and certain taxes have been levied upon said land prior to the entry of the same: Therefore

"It is ordered that the treasurer of Webster county be hereby directed to mark upon the tax records of said county opposite said lands, in all cases prior to the tax of 1864, 'Lands released from this tax as per order of the board of supervisors, Sept. 6, 1864;' and said lands are hereby released."

18] "The following order, book 1, page 180, was also passed in reference to the S. E. quarter of section 11, T. 88, R. 28, viz:

"Whereas the S. E. quarter of sec. 11, T. 88, R. 28 west, of the 5th P. M., Iowa, was, on or about the 10th day of April, 1863, entered in the United States land office, and has since been patented to Frederick Crouse by patent dated May 5, 1864; and

"Whereas the said land has been assessed prior to the date of said entry, and taxes levied thereon: Therefore

"It is ordered that the treasurer of Webster county be hereby directed to *make* upon the tax records of said county opposite said lands, in all cases prior to the tax of 1864, the following entry, to wit: 'Lands released from this tax as per order of the board of supervisors, Sept. 6, 1864,' and said lands are hereby released."

64 19] "WASHINGTON CITY, D. C., *May* 23, 1866.

"To the honorable census board of the State of Iowa, Des Moines:

"Pursuant to the requirements of chapter 79 of the acts of the eleventh General Assembly I have the honor to report—

"That I have consummated an adjustment with the United States of the excess of lands received by the State under the act of Congress of July 12, 1862, and transmit herewith for your approval a copy of the agreement containing the terms of said adjustment.

"It will be observed that the State in this settlement is credited with the whole amount of land in odd sections and lying within five miles of the Des Moines river, from the Raccoon Forks to the northern boundary of the State, determined (by the Department) to be 558,004.06 acres.

"The State is then charged with the several quantities of land following, to wit:

	Acres.
"1st. Indemnity lands selected under special certificate, dated April 25, 1863	297,603.74
"2d. Remaining lands in place yet to be certified	167,109.02
"3d. Lands in place confirmed by the joint resolution of March 2, 1861	44,838.46
"4th. Lands selected and heretofore certified on the east fork of the Des Moines river and more than five miles from the western or main branch	11,661.80
"5th. The excess selected and approved to the State as a part of the 500,000-acre grant, under the act of September 4, 1841	35,473.84
"Making in all	556,686.74
"And leaving due the State, to balance the whole account of the	1,317.32

65 "For this a special receipt will be issued.

"The 11,661.80 acres on the east branch of the Des Moines river heretofore approved to the State as a part of the Des Moines river grant and disposed of by the State as such are held by the Department, under the decision of the Attorney General, to be a proper and legitimate offset to so much of this grant. Hence they are charged to the State in this settlement.

"The 35,673.54 acres charged in excess under the 500,000-acre grant (act 1841) include the 25,660.03 acres over and above the 500,000 acres which are embraced in the book of diagrams approved and certified to the State on the 12th of September, 1854, and which have hitherto been considered the excess; and also the 12,813.51 acres which were once approved as a part of the 500,000-acre grant, and afterward rejected and approved and certified as a part of the Des Moines river grant. These lands have been known as the 'river school lands.'

"Notwithstanding that they have been disposed of by the State as a part of the Des Moines river lands, said chapter 79 requires that they shall be included and certified as a part of the grant of 1841.

"Deeming it my duty to carry out the provisions of the law, regardless of my personal opinion as to their correctness or propriety, I have thus included these lands, thereby increasing said excess to 35,475.54 acres, and allowed them to be deducted from the amount of the Des Moines river grant due the State, as the Department had determined.

"The proper and necessary lists, according to the terms of this adjustment, will be made and approved by the Secretary and delivered to me or sent to the State.

"In the preparation of these lists all lands which appear at the General Land Office as having been selected as swamp under act of September 28, 1850, and all tracts to which pre-emption rights had attached prior — July 12, 1862, will be excluded.
66 If, however, any of the tracts thus listed and certified shall be found to have been duly selected under said act of September 28, 1850, and shall be shown by legal investigation to be swamp or overflowed or to belong to the State by said act the Government will approve and certify other lands of like quantity in lieu thereof.

"This adjustment, which I think is fair and just and should be satisfactory to the State, will, when approved by you, be a final settlement between the State of Iowa and the United States of all claims under the Des Moines river grant, as well as of the act of 1841, except as far as valid and legal subsisting adverse rights may be found to exist to any of the tracts thus approved to the State.

"The excess of the 500,000-acre grant (35,475.54 acres) thus deducted is, by an agreement between the State and the Des Moines Valley Railroad Company (the beneficiary of the grant), to be credited to said company, at the rate of one dollar and twenty-five cents per acre, in the satisfaction of claims against the State on account of the improvement of the Des Moines river. Said company should, therefore, be credited on the claims they are under obligations to satisfy with the sum of $44,341.67.

"My authority extends only to settlement with the General Government. I have no power to carry out this agreement between the State and the company. It is but just, however, for me to say that this settlement has been made with the United States with the full understanding that this arrangement should be carried out.

"The company, through its agents, has for a long time been laboring to this end. The opinion and decision of the Secretary of the Interior (a copy of which, accompanying Mr. Kilbourn's report made last winter, is herewith transmitted for your examination in connection with this adjustment) is the result of their efforts.

67 "The labor of these agents (Messrs. Kilbourn and Wason) heretofore in the premises has greatly relieved me and enabled me to close up the settlement thus early. It is due the company that this credit be given as soon as possible.

"I hope, therefore, that this entire agreement will meet with your approbation and that you will, as I think you have a right and may safely do, fully consummate and carry it out by giving said company the benefit of said credit against said claims without delay.

“Very respectfully submitted,

“J. A. HARVEY,
“*Commissioner.*”

“*Adjustment of the Iowa Des Moines River Grant under the Act of July* 22, 1862, *and Joint Resolution of March* 2, 1861.

“DEBIT.

	Acres.
“The State of Iowa, with the quantity of indemnity lands selected under special certificate dated April 25, 1863	297,603.74
“The lands in place to be certified	167,109.02
“The lands in place confirmed by joint resolution of March 2, 1861	44,838.64
“The quantity selected on the east fork of the Des Moines river, and certified to the State under the original law of August 8, 1846	11,661.80
“The excess selected and approved to the State under the 500,000 grant, 1841	35,473.54
	“556,686.74
“Remaining indemnity due to the State	1,317.32
	“558,004.06
	“558,004.06

68 “CREDIT.

“The State of Iowa with the whole area of the grant above the Raccoon Forks	558,004.06
	“558,004.06

“General Land Office, May 21, 1866.

“J. M. EDMUNDS,
“*Commissioner General Land Office.*”

“WASHINGTON CITY, *May* 21, 1866.

“Pursuant to the authority conferred by the act of the State of Iowa, approved March 30, 1866, ‘for the adjustment of certain land claims with the General Government,’ I, Josiah A. Harvey, register of the State land office and as commissioner on behalf of the State, do hereby assent to the adjustment as herein stated, the said adjustment to be held as binding and conclusive on the said State as provided in said act.

“JOSHUA A. HARVEY,
“*Register of the State Land Office and Commissioner on Behalf of the State of Iowa.*”

"STATE OF IOWA, *ss:*

"The within adjustment as stated is hereby approved by us for the State of Iowa.

"June 20, 1866.

[SEAL.]
"WM. M. STONE, *Governor*,
"JAMES WRIGHT, *Secretary of State*,
"JOHN A. ELLIOTT, *Auditor*,
"W. H. HOLMES, *Treasurer*,
"*Census Board.*"

"DEPARTMENT OF THE INTERIOR, *May* 22, 1866.

"The adjustment as herein stated is hereby approved.

"JAS. HARLAN, *Secretary.*"

69 21] "DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *March* 7, 1867.

"Register and receiver, Fort Dodge, Iowa.

"GENTLEMEN: Cash pre-emption entry No. 5276, in the name of J. W. Payne, is suspended for the reason that it embraces lands certified to the State of Iowa, March 10, 1852, under act of August 8, 1846, and again certified June 14, 1866, under joint resolution of March 2, 1861. Said entry embraces the S. W. qr. sec. 9, t'p 86, rng. 27, and is claimed by the Des Moines Navigation Improvement Co., is above the Raccoon Forks, and if improperly certified to the State in 1852 may have been subject to settlement by a *bona fide* pre-emptor in 1854, date of Payne's settlement.

"Mr. Payne clearly proves settlement in May, 1854, the erection of a dwelling-house in the fall of 1855, and continued residence on said land ever since.

"For failure to prove up and pay therefor he alleges the refusal of your office on account of the adverse claim of said company.

"Said joint resolution of March, 1861, provides 'that all the title that the U. S. still retains to certain land above the mouth of the Raccoon Forks, and which have been improperly certified to said State, is hereby relinquished,' &c.

"Mr. Payne's pre-emption claim having attached prior to March, 1861, to lands improperly certified in 1852, and his proof being otherwise sufficient, he makes out a *prima facie* case, and you will notify said Des Moines Improvement Company, or other adverse claimant, to show cause upon a notice, of say thirty days, why the State of Iowa ought not to relinquish any right or color of right she may claim to have acquired to the tract in question by virtue of said improper certification, and the entry of said Payne be thereupon patented.

70 "Upon the expiration of the time specified report the action had, referring to this date.

"Very respectfully, y'r ob't ser't,

"JOS. S. WILSON,
"*Commissioner.*"

22] " DEPARTMENT OF THE INTERIOR,
" GENERAL LAND OFFICE.

" Register and receiver, Fort Dodge, Iowa.

" GENTLEMEN: J. Browne, Esq., of Des Moines, Iowa, has filed in this office two affidavits impeaching the pre-emption claim of John Page to W. h'f se. qr. and E. h'f S. W. qr. sec. 19, T. 89, R. 26 W., and asking for an investigation.

" The records of this office show that Page filed his D. S. No. 1872 for said tracts Aug. 30, 1866, alleging settlement upon the W. h'f S. E. sec. 19, October 17, 1852, and that he proved up and located warrant No. 88978, 160 acres, act 1855, upon the whole of his claim February 27, 1867.

" The proof shows a settlement by Page in October, 1851, and that he (Page) has claimed, cultivated, and occupied said tracts since that time and now resides thereon and has fifty acres under cultivation.

" On the contrary, the affidavits furnished by Mr. Browne assert that Page resides on the S. W. qr. S. W. qr. sec. 19, and not on the land pre-empted, and that Page removed from Illinois to Iowa and settled upon said section in 1864 and built a log-house on said S. W. of S. W. of 19 in the spring of 1863, where he now resides.

" This tract falls within the limits of the Des Moines river grant and was approved to the State December 30, 1853, but has never been confirmed under the joint resolution of March, 1861, or act of July, 1862.

71 " You will order an investigation in this case, notifying Page and the proper authorities of the State and 'Des Moines River Navigation Company' of a time and place when and where the same will be held.

" You will conduct the hearing in the usual manner, and allow each party to cross-examine the witnesses of the other, and in this way bring out all the facts.

" The affidavits filed by Mr. Browne and the proof in the case are herewith enclosed.

"At the conclusion of the hearing you will transmit the testimony elicited, with your joint opinion, and the inclosed papers to this office in a special letter, referring to this as 'G' by its date.

" Very respectfully, JOS. S. WILSON,
" *Commissioner.*"

Protest by the D. N. R. R. Co. against release by the State of Iowa of any lands under the river grant as contemplated by chapter X, act 12th General Assembly.

23] " To the Governor and register of the State land office of the State of Iowa:

Whereas the Government of the United States has heretofore, at different dates, certified to the State of Iowa a great portion of the lands known as Des Moines river lands, lying in the odd-numbered sections within five miles of the Des Moines river and above the Raccoon Forks, in said State; and

Whereas the State of Iowa, since the said lands have been so certified, under and by authority of the General Assembly of said State, duly given and conferred, has, by its proper executive officers,
granted and conveyed to the Des Moines Navigation and
72 Railroad Company, a corporation duly organized under the
laws of the State of Iowa, and to divers persons or individuals
as grantees, all, or nearly all, of said lands; and

Whereas by the acts and resolutions of the Congress of the United States and the decision of the Supreme Court of the United States the title to said lands so conveyed by the State of Iowa to its grantees is vested and confirmed in the said grantees of the State absolutely and indefeasibly; and

Whereas, in defiance or disregard of the said acts and resolutions of Congress and the decision of the said Supreme Court, the Commissioner of the General Land Office has recognized and allowed the alleged claims of certain pretended pre-emptors on said lands, and announced and declared his purpose and intention of issuing to such pretended pre-emptors patents for said lands, upon the execution of a release by the Governor of the State of Iowa to the United States of all the interest which the State now has in said lands covered by such pretended pre-emptions; and

Whereas the General Assembly of the State of Iowa, on the 5th day of February, A. D. 1868, passed an act authorizing the Governor of the said State to execute releases of such lands to the United States, which said act is entitled 'An act to authorize the Governor to release lands which have been certified to the State by authority of the Secretary of the Interior under the land grants where settlers' rights have intervened prior to the time when the title vested in the State, and for the purpose of correcting errors in transfers to the State,' and which has been duly approved by the Governor of said State; and

Whereas it has been judicially settled that the State of Iowa now has no interest in or title to said lands, but that the same belong to and the title thereof is vested in the purchasers and grantees of the
said land under and from the State of Iowa:

73 Now, therefore, the said Des Moines Navigation and Rail-
road Company, and the individuals now holding title to the
said river lands, believing that the State has now no interest whatever in said lands, and that such releases, if executed by the Governor, will only tend to cast a cloud upon their title as owners of the said lands and lead to confusion and prolonged litigation, resulting in injury ultimately both to the pretended pre-emptors and to us who hold the titles to said lands, do most earnestly, but respectfully, protest against any and all releases of said lands by the Governor to the United States under the said act of said General Assembly of the State of Iowa, above referred to.

"Des Moines, Iowa, Feb'y 7, 1868.

"Copies del'd to the Governor and register, and sent to the Com'r Gen. Land Office, Mar. 17, 1868."

24] "DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *March 24th*, 1868.

"J. Browne, Esq., Des Moines, Iowa.

"SIR: Your letter of the 17th inst., enclosing your protest as agent of the 'Des Moines Navigation and Railroad Co.' against the relinquishment by the Governor of Iowa of certain lands within the five-mile limits of the Des Moines river, has been received and placed upon the file of this office.

"Very respectfully, JOS. S. WILSON,
"*Commissioner*."

25] "DEPARTMENT OF THE INTERIOR,
"WASHINGTON, D. C., *May* 9, 1868.

"SIR: I have received your report of the 9th October last, and the accompanying papers, in the case of Herbert Battin, from the Des Moines office, Iowa, claiming the right of pre-emption to the southwest quarter 3, township 83, range 27, by reason of a settlement made thereon October 2, 1857.

74 "It appears from your report that on the 6th of December, 1866, you awarded the land to Battin, but as it had been previously certified to the State of Iowa under the railroad grant of May 15, 1856, you required a relinquishment on the part of the State before issuing patent; that on the 23 ——, 1867, you re-examined the case and decided to cancel the entry of Battin, upon the ground that his settlement commenced after the rights of the railroad company had attached.

"From this decision Battin appeals. The required relinquishment under the railroad grant was received at your office after you had made the second decision.

"This tract of land is a part of an odd-numbered section situated above Raccoon Forks, within five miles of the Des Moines, and claimed as a part of the grant to Iowa to aid in the improvement of said river. It is also within the six-mile limit of the railroad grant, and was approved and certified to the State under both grants.

"In view of these grants, the general decisions of the Department and of the Supreme Court in reference to their extent and validity, it becomes necessary to review the whole matter in order to — a correct determination of the case under consideration.

"1st. The act of Congress, approved August 8, 1846 (9 Stat., 777), granted to the Territory of Iowa 'for the purpose of aiding said Territory to improve the navigation of the Des Moines river from its mouth to the Raccoon Forks (so called), in said Territory, one equal moiety, in alternate sections, of the public lands remaining unsold and not otherwise disposed of, incumbered, or appropriated, in a strip five miles in width on each side of said river,' to be selected within said Territory by an agent or agents, &c.

"The proper State authorities, February 15, 1851, formally notified your office that they selected the odd sections above the Raccoon Forks to the source of the Des Moines river; and on
75 the 10th March, 1852, certain lands, among which was the tract in question, were approved to the State by Secretary

Stuart, in view of the decision of Secretary Walker that the grant extended above said forks. Prior to this last date several conflicting decisions had been made as to the limits of this grant, some extending it only to the mouth of the Raccoon Forks, others to the northern boundary of the State.

"At the December term, 1859, the Supreme Court of the United States, in the case of the Dubuque & Pacific Railroad Company *vs.* Litchfield (23 Howard, 66), decided that this grant did not extend above the Raccoon Forks.

"The action of the executive departments awarding and transferring to the State under this grant lands situated above the said fork was regarded by the Court as unauthorized and void.

"They were, therefore, approved to the State for railroads under said act of May 15, 1856, so far as such lands were situated within the prescribed limits of the line of the road.

"The attorney of the Des Moines Navigation and Railroad Company, in a very elaborate brief, contends that under the grant of 1846 this land was withdrawn, and that the original decision of the court could not operate to restore it. He refers to the instructions issued by the Commissioner of the General Land Office of June 1, 1849, to the register and receiver at Iowa City, Iowa, for evidence of withdrawal. Upon looking at these instructions it is found that the withdrawal only extended up to township 83 north, range 26 west, that being as far as the public surveys had progressed in that direction. This tract is, consequently, not within the limits of that withdrawal.

"Besides, the Court held that the act of Congress 'was a grant to Iowa of an *individual* moiety of the lands below the Raccoon Forks, and the officers of the executive department had no further
authority than to make partition of these lands. Having ex-
76 tended their acts to lands lying outside of the boundaries,
their attempts to make partition were merely nugatory.'

"The grant being thus restricted to lands below the Raccoon Forks, Congress, by resolution approved March 2, 1861, relinquished to the State of Iowa all the title the United States then held in the tracts of lands above the said forks, which had been improperly certified to said State under the grant of 1846, and which were then held by *bona fide* purchasers under the State.

"It is also claimed that the Des Moines Improvement Company was a *bona fide* purchaser from the State, and consequently that the defect of title was cured by said resolution. After it had been approved the State was called upon to furnish a list of the tracts improperly certified to her which she had sold.

"This tract is not found in the State's list, although it appears in a list of tracts said to have been sold by the company.

"Said resolution not covering all the lands claimed for the Des Moines river grant, Congress passed the act approved July 12, 1862.

"This act makes a new grant to the State of those lands above the Raccoon Forks, 'to be held and applied in accordance with the original grant,' except a portion thereof which are to be used to aid in constructing a railroad, and it is provided that 'if any of said lands shall have been sold or otherwise disposed of by the United States, excepting those released under the joint resolutions,' an equal amount of lands within the State are to be set apart and certified in lieu thereof.

"Referring to the original grant, it is found to include only public lands 'remaining unsold and not otherwise disposed of, incumbered, and appropriated.' The new grant gives indemnity for any of such lands above the said forks disposed of except those released
77 by the resolution.
In view of this legislation it became necessary to ascertain what indemnity, if any, was due the State. The Commissioner of the General Land Office, therefore, stated an account between the United States and the State of Iowa, dated May 21, 1866. The State was credited with the amount of the odd-numbered sections within five miles of the Des Moines river above the Raccoon Forks, being a total of 558,004.06 acres, and debited as follows:

	Acres.
"1st. Land selected under special certificate	297,603.74
"2d. Land in place to be certified	167,109.02
"3d. Land confirmed by resolution	44,838.64
"4th. Land confirmed on east fork	11,661.80
"5th. Excess selected and approved under the act of 1841	35,473.54
	"556,686.74
"Leaving due the State	1,317.32
	"558,004.06

"This adjustment was accepted by Josiah A. Harvey, 'register of the State land office and commissioner on behalf of the State of Iowa,' and approved by Mr. Sec. Harlan May 29, 1866. The 1,317.32 acres were subsequently selected and approved to the State. The State, by the deliberate and recorded admission of her authorized agents, has thus received all the lands to which she was entitled on account of the improvement of said river. The adjustment is conclusive and final.

"As the State received indemnity for this identical tract, her claim on behalf of the Des Moines Company must be rejected without regard to adverse claims.

"2d. Having disposed of the claim under the river grant, I proceed to consider that of the railroad. I premise by saying that while it appears the railroad company was notified of
78 the appeal taken by Battin, they have failed to put in an appearance.

"The grant to the State for the purpose of aiding in the construction of railroads by said act of 1856 granted every alternate odd-numbered section for six sections in width on each side of each of the roads, with the right to select indemnity for such sections or parts thereof disposed of, with a proviso reserving from the operation of the grant any and all lands reserved for the purpose of aiding in any of the internal improvements, etc.

"The Supreme Court of the United States, at the December term, 1866 (5 Wallace, 681), rendered a decision to the effect that said proviso operated to exclude from the railroad grant the odd-numbered sections within five miles of the Des Moines river, above the Raccoon Forks, and that the same passed to the State under the acts granting lands to aid in improving said river.

"At the date of that decision the Des Moines river grant had been finally adjusted.

"The State had, as before remarked, received all the land to which she was entitled on account thereof, and she is thus estopped from setting up a claim. Although this fact does not appear in the record of the case, I have shown that it is incontrovertibly established by the records of your office. It is the duty of the Department, in administering the acts of Congress, to give full effect to the settlement; otherwise the State would first obtain, in lieu of lands which she alleges had been 'otherwise disposed of,' an indemnity amounting to an equal quantity of such lands, and then when her right to land selected by way of indemnity had been recognized and confirmed to her she could assert her title to the lands she alleged had been disposed of. The effect of this would give her more than she originally claimed. The effect of that decision is, therefore, only to exclude from the railroad grant lands lying north of the forks, and to restore them to the public domain, at least so far as to subject them
79 to the operation of the pre-emption and homestead laws. Further, by act of June 2, 1864 (13 Stat., 98), amendatory of the grant of 1856, additional lands were granted to the State, and new provisions were engrafted upon the original law. One of these—the last proviso to the fourth section—excludes from the railroad grant any land 'settled upon and improved in good faith by a *bona fide* inhabitant under color of title derived from the United States or State of Iowa adverse to the grant,' and the railroad company are authorized to select other land in lieu of tracts so settled upon and improved. These *bona fide* inhabitants need not necessarily be pre-emption settlers, but they must be *bona fide* settlers claiming from the United States or State of Iowa. Consequently the State could have no valid claim under the railroad grant to any tract settled upon or improved in good faith by a *bona fide* inhabitant. Furthermore, it is certified by the executive of the State that the State has not transferred this tract, and he relinquishes any title or color of title to it by virtue of its having been approved and certified under that grant.

"3d. The remaining question to be determined is whether Battin's claim can be allowed. It is not material to consider whether this land has ever been reserved so as to exclude it from the operation of the pre-emption laws. Even if such had been the case the difficulty would be removed by the proviso in the act of 1864, and it is only necessary to ascertain whether he is a '*bona fide* settler,' etc.

"From the evidence it would appear that Battin settled upon the land in good faith in October, 1857, having purchased the improvements of a prior settler, and has complied with the requirements of the pre-emption law and been allowed to enter the land.

"That entry is in accordance with law, and will be carried into patent.

80 "I am, sir, very respectfully, your obedient servant,

"O. H. BROWNING, *Secretary.*

"Hon. Joseph S. Wilson, Commissioner General Office."

26] "DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *May 21st,* 1868.

"C. C. Carpenter, Esq., register State land office, Des Moines, Iowa.

"SIR: I have the honor to enclose herewith a copy of the decision of the hon. Secretary of the Interior dated May 9, 1868, relative to the Des Moines pre-emption cash entry, No. 21240, of Herbert Battin for S. W. qr. 3, 83, 27, by which you will perceive that the hon. Secretary awards said tract to Mr. Battin and rejects the claim of the Des Moines River Navigation Company and the Iowa Central Air Line railroad thereto.

"I would add that under date of the 13th inst. the hon. Secretary affirmed our decision of October 19, 1867, awarding N. h'f S.W. qr. and S.W. qr. 25, 85, 27, to Daniel C. Shepley, per cash entry No. 21235, as against the asserted claim of the Des Moines Company to the same tract.

"JOS. S. WILSON,
"*Commissioner.*"

27] "DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *June 8th,* 1868.

"Register and receiver, Fort Dodge, Iowa.

"GENTLEMEN: This office has had under consideration the papers in connection with the pre-emption cash entry, No. 5207, of William Riley, covering the N. E. qr. of sec. 33, T. 89, R. 28, contested by the Dubuque & Sioux City R. R. Co. and the Des Moines Navigation Company.

81 "The testimony shows that Riley went upon said tracts in 1855 or '6 for the purpose of making a permanent settlement thereon; built a house in 1857 and '8 and ploughed and fenced a portion of his claim. Said pre-emptor, however, was deterred from making further improvements upon said tract by parties claiming under the Des Moines Navigation Co.

"Riley still cultivated said tract and was in possession thereof in July, 1860, when he filed D. S. 1602 thereon.

"In August, 1862, having enlisted in the military service of the United States, Riley again filed his D. S. 1764 as a notice that he still claimed said tracts, and to protect his rights while absent in the army.

"After his return from the service he again went upon his claim; built a house and now resides there with his family, and it is shown that his improvements are worth $1,500.

"The tract in question is embraced in the settlement of May 29, 1866, with the State of Iowa, and therefore neither the Des Moines Navigation Company *now* the Dubuque & Sioux City R. R. Co. can have any valid claim thereto, according to the principles laid down in the decision of the hon. Secretary of the Interior of May 9th, 1868, in the case of Herbert Battin from the Des Moines district. For your information a copy of said decision is herewith enclosed.

"Your decision awarding said tract to Riley is concurred in, and his entry approved, subject to appeal.

"You will notify the parties in interest and allow thirty days for appeal from the date of your letter.

"Please advise this office of the action taken at the expiration of the time specified, and in your reply refer to this letter as "G" by its date.

"Very respectfully, JOS. S. WILSON,
"*Commissioner.*"

82 Endorsements on said letter:

"FORT DODGE, IOWA, *June 17th*, 1868.

"I hereby acknowledge reception of notice of the within decision of the Commissioner of the General Land Office.

"WOLSEY WELLES,
"*Attorney for William B. Wells,*
"*Grantee of Des Moines Navigation & Railroad Co.*"

28] "DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *Oct. 6th*, 1868.

"Register and receiver, Fort Dodge, Iowa.

"GENTLEMEN: Under date of June 8th, 1868, this office decided the contested case of William Reilly *vs.* The Dubuque & Pacific railroad in favor of Mr. Reilly and allowed thirty days for appeal.

"No appeal was taken by the railroad Co., and the Governor of Iowa was called upon for a relinquishment of the tract in question, N. E. ¼ sec. 33, T. 89, R. 28, the same having been approved to the State April 7th, 1863, for the use of said railroad company.

"The Governor of Iowa has formally relinquished said land to the United States by deed of release, dated September 12th, 1868, and therefore the cash entry, No. 5207, of William Reilly, dated February 27th, 1865, and covering said N. E. ¼, 33, 89, 28, has this day been relieved from suspension, approved, and filed for patenting.

"The patent in this case will be forwarded to N. P. Cousin, Esq., of this city, who has filed in this office the duplicate receipt.

"Very respectfully, JOS. S. WILSON,
"*Commissioner.*"

83 It was agreed in open court, for all the purposes of the case, that the lands the taxes on which are in controversy are lands within the limits of the grant known as the Des Moines river grant and were certified as such.

30] "WASHINGTON CITY, *May* 25, 1860.

"Hon. Joseph S. Wilson, Com'r General Land Office.

"SIR: Referring to the recent decision of the Supreme Court of the United States on the Des Moines river improvement claim, I herewith transmit a list, marked C, of my selections of this date, for and on account of the Dubuque & Pacific railroad and branch under the act of 15th May, 1856, of the interfering lands in the Fort Dodge district, Iowa, within the six and fifteen mile limits of said railroad grant heretofore held in suspension in our adjustment.

"The list discriminates the lands conditionally approved for the river grant for those not yet approved in any list, and embraces as follows:

"Whole quantity, 6-mile limits	59,418.22	acres.
" 15-mile "	73,792.35	"
"Total	133,606.57	

"Of which the quantity not yet approved all west of the river is as follows:

"Not approved, 6-mile limits	15,450.47
"15 " "	16,214.12
"Total	31,664.59

"I also enclose a connected diagram, marked D, showing by the pink and yellow shades thereon the lands hereby selected.

"Please acknowledge the receipt hereof.

"Very respectfully, your obedient servant,

"WM. T. STEIGER,

"*Agent, etc.*"

84 Extract from letter dated June 11, 1860, and addressed by J. Thompson, Secretary of the Interior, to Hon. R. W. Johnson, chairman of the Committee on Public Lands, United States Senate.

31] "DEPARTMENT OF THE INTERIOR, *June* 11, 1860.

"SIR: Herewith I have the honor to transmit a copy of the report of the Commissioner of the General Land Office of the 7th inst. upon Senate joint resolution number 37 and the memorial relative to certain tracts of land heretofore certified to the State of Iowa as part of the grant made to said State by the act of August 8, 1846, and to return all the papers submitted with your several letters of the 28th ultimo and the 11th inst.

"The Commissioner has sent with his report copies of two letters addressed to him by W. T. Steiger, Esq., and one by Hon. Charles Mason, agents of the State, and having reference to the lands in question, and which, it appears, would be proper to lay before you. The draft of a bill is also herewith enclosed, which was furnished to Hon. James W. Grimes in a letter addressed to him dated 22d ultimo, of which I also enclose a copy.

"In the matter of the grant for the improvement of the Des Moines river, as also for the later grants for railroad purposes, the Department deals directly with the State and not with parties claiming under her.

* * * * * * *

"Very respectfully, your obedient servant,

"J. THOMPSON, *Secretary.*

"Hon. R. W. Johnson, Ch'n Com. Pub. Lands, U. S. Senate."

32] "GENERAL LAND OFFICE, *June* 12, 1860.

"W. T. Steiger, Esq., Washington, D. C.

"SIR: I have to acknowledge the receipt of your letter of the
85 25th ult. enclosing lists and maps of lands selected and claimed
under the railroad grant to Iowa by act of May 15th, 1856, for the Dubuque & Pacific railroad.

"The tracts in said lists are above the Raccoon Forks and within the lands that have been selected under the Des Moines river grant by act of 1846, and, in view of the recent decision of the Supreme Court affecting a title to lands under the grant above the said forks, the present lists are handed in by you.

"As the matter has been placed in train for congressional intervention, no action can be taken in the matter presented by you until Congress shall have time to consider and dispose of the subject.

"Very respectfully, your obedient servant,

"JOS. S. WILSON,
"*Commissioner.*"

33] "GENERAL LAND OFFICE, *July 7th*, 1860.

"Hon. J. Thompson, Sec. of Interior.

"SIR: I have the honor to return herewith the letter, dated 26th ultimo, from W. T. Steiger, agent, &c., asking that certain lands selected and claimed under the railroad grant act to Iowa of May 15th, 1856, may, without further delay, be certified to the State, and, pursuant to reference, respectfully submit that the lands referred to are embraced in certain lists filed in this office during the past month in view of the recent decision of the Supreme Court affecting a title to lands under the Des Moines river grant of 1846 above the Raccoon Forks. The tracts in said lists are above the Raccoon Forks and within the lands that have been selected under the above-mentioned river grant.

"Upon the receipt of these lists Mr. Steiger was advised that, as the matter had been placed in train for congressional intervention, no action could be taken by this office until Congress should have had time to consider and dispose of the subject.

86 "Without passing upon or, in fact, considering the question
as to the right of the State under the railroad grant to these lands, which at the date of that grant had been withdrawn from sale or location, the fact that Congress has taken incipient action in the matter of itself justifies us in not recommending further proceedings

by the Department until after the close of the next session of Congress.

"Very respectfully, your obedient serv't,

"JOS. S. WILSON,
"*Commissioner.*"

Extract of a letter dated November 3, 1860, addressed by J. Thompson, Secretary of the Interior, to Hon. George W. Jones, U. S. Senator from Iowa.

34] "DEPARTMENT OF THE INTERIOR,
"WASHINGTON, *Nov.* 3, 1860.

* * * * * * *

"For your information I herewith enclose copies of my letters of the 6th September last to the Commissioner of the General Land Office, and of the 1st October to Mr. Steiger, and in reply to your letter would state that, as respects those lands within the limits of the railroad grant which have already been certified to the State of Iowa by your predecessor under the previous grant of 8th August, 1846, in the absence of a formal and sufficient surrender by the State of all claims under the prior grant, and a direct demand from the State authorities for lists under the later grant, I deem it proper to suspend action at present so far as the claims interfere.

* * * * * * *

"Very respectfully, your obedient servant,

"J. THOMPSON, *Secretary.*

"Hon. Geo. W. Jones, of Iowa, present."

Stipulation No. 2.

87 It is hereby stipulated that the State of Iowa, pursuant to a settlement with the Des Moines Navigation and Railroad Company under the joint resolutions of its General Assembly entitled "Joint resolutions containing propositions for a settlement with the Des Moines Navigation and Railroad Company," approved March 22, 1858, conveyed on the 3d day of May, 1858, by its several deeds or patents of that date, to said D. N. & R. R. Co. 256,707.64 acres of land by specific descriptions; and on the 18th of May, 1858, for the purpose of covering any tracts or parcels that might have been overlooked or omitted in said deeds or patents, executed a further conveyance, conveying to said company by general description "all lands granted by act of Congress approved August 8, 1846, to the then Territory of Iowa to aid in the improvement of the Des Moines river which have been approved and certified to the State of Iowa by the General Government, saving and excepting all lands sold or conveyed, or agreed to be sold or conveyed, by the State of Iowa, by its officers and agents, prior to the 23d day of December, 1853, under said grant." These several deeds or patents conveyed in all 266,188 acres, of which 53,367 acres are below and and 212,741 above the Raccoon Forks, and 212,558.27 acres thereof

were embraced in the lands certified and approved to the State of Iowa on and prior to December 30, 1853, under the grant of August 8, 1846.

WRIGHT, GATCH & WRIGHT,
Sol'rs for Complainant.
JOHN F. DUNCOMBE,
Attorneys for Defendants.

STATE OF IOWA, *Webster County:*

I, Jonathan Hutchison, of lawful age, being duly sworn, state that I was treasurer of Webster county, Iowa, from January, 1868, until January, 1878; that I am familiar with the taxes claimed in the above-stated cause to be illegal from 1859 to 1866, inclusive.

88 That neither complainant, Edwin C. Litchfield, John Browne, his agent, or any other person ever offered to pay the taxes for any or all the years from 1859 to 1866, inclusive, with interest and penalties, on the lands of complainant, or any of said land.

Mr Browne offered, I think, in 1873, to pay the taxes for 1862, '3, '4, '5, and 1866, with ten per cent. interest, if I would leave the taxes of 1859, 1860, and 1864 out of the receipts.

This I refused to do, as the only authority I had to take the taxes from 1862 to 1866, inclusive, was conditioned on the settlement of the taxes of 1859, 1860, and 1861, and these taxes Mr. Browne refused to pay, and thus ended the proposition of the county to make such a compromise.

J. HUTCHISON.

Sworn to and subscribed before me in my presence by J. Hutchison this 5th day of September, A. D. 1878.

Witness my hand and official seal this day.

[SEAL.] J. F. DUNCOMBE,
Notary Public, Webster County, Iowa.

The following extracts, read in evidence by the defendant, are from the printed transcript in the said homestead case in 17 Wallace, 157:

Bond for Cost.

Docket entries and extracts from minutes Supreme Court of the United States in Samuel G. Wolcott, plaintiff in error, *v.* The Des Moines Navigation and Railroad Co.

Docket Entries.

Supreme Court of the United States. December Term, 1864.

89 THE DES MOINES NAVIGATION & RAILROAD COMPANY, Plaintiff in Error,
vs.
CALVIN BURR.
} No. 336.

In error to the circuit court of the United States for the southern district of New York.

Chas. Tracy; P. Smith, for intervener.

1864, Dec. 10.—Record received and filed.

No. 221. December term, 1865. Docket entries continued:

1866, Feb. 8.—Motion of Mr. Allison for leave to intervene filed.
1866, Feb. 8.—Affidavit of J. M. McKinley filed.
" 13.—Leave granted to the Dubuque & Sioux City R. R. Co. to intervene, &c.
1866, Feb. 21.—Brief of P. Smith, for intervener, filed.

No. 133, of December term, 1869. Docket entries continued:

1866, Dec. 14.—Mr. J. F. Duncombe filed a motion to intervene, &c.
1866, Dec. 17.—Leave granted Mr. Duncombe to appear and file printed argument.
1866, Dec. 17—No. 204 to be argued with this case.
1867, Feb. 8.—Submitted with No. 204.
" May 13.—Reversed with costs and a venire awarded.

Extract from Minutes.

Supreme Court of the United States. Dec. Term, 1865.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, Plaintiff in Error,
vs.
CALVIN BURR.

* * * * * * *

On consideration of the motion made and affidavit filed in this
cause on the 8th instant, it is now here ordered by the Court that
leave be, and the same is hereby, granted counsel of the
90 Dubuque and Sioux City Railroad Company to appear and
be heard on the argument when this cause is reached.

13 February, 1866.

No. 133, of December Term, 1866.

* * * * * * *

THE DES MOINES NAVIGATION AND R. R. Co., Plaintiff in Error,
vs.
CALVIN BURR.

On consideration of the motion of Mr. Duncombe for leave to intervene, etc., in this case, it is now hereby ordered by this Court that leave be, and the same is hereby, granted Mr. Duncombe to intervene in behalf of the Iowa Homestead Company in the argument of this cause, and to file a printed argument.

17 December, 1866.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, Plaintiff in Error,
vs.
CALVIN BURR.

Ordered by the Court that No. 204, Samuel G. Wolcott, plaintiff in error, *vs.* Des Moines Navigation and Railroad Company, be argued by counsel, if desired, with No. 133, when reached in the regular call of the docket.

17 December, 1866.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, Plaintiff in Error,
vs.
CALVIN BURR.
No. 133.

This cause was submitted to the Court on the record and printed argument by Mr. Smith, of counsel for interveners, and stipulation of counsel filed to be considered with No. 204, submitted on printed arguments at the last term of this Court.

8 February, 1867.

91 Supreme Court of the United States. December Term, 1866.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, Plaintiff in Error,
vs.
CALVIN BURR.
No. 133.

In error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of New York, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of said circuit court in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said circuit court, with directions to award a *venire facias de novo.*

Per Mr. Justice Nelson.

Mr. Justice Miller took no part in the decision of this case.

True copies of docket entries, extract from minutes, and judgments.

Test: [SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

Supreme Court of the United States. December Term, 1866.

The Des Moines Navigation and Railroad Company, Plaintiff in Error, *vs.* Calvin Burr.	No. 221.

In error to the circuit court of the United States for the southern district of New York.

92 The Dubuque & Sioux City Railroad Company, a corporation, etc., by Wm. B. Allison, its attorney, now comes and moves the Court for leave to intervene in the above-entitled cause, and also for leave to file an argument in same for reasons set forth in affidavit filed herewith and made a part hereof.

DUBUQUE & SIOUX CITY
RAILROAD COMPANY,
By WM. B. ALLISON, *Its Attorney.*

True copy. Test:
[L. S.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

Supreme Court of the United States. December Term, 1865.

The Des Moines Navigation & Railroad Company, Plaintiff in Error, *vs.* Calvin Burr.	No. 221.

In error to the circuit court of the United States for the southern district of New York.

I, James McKinley, on oath say that I am an attorney and counsellor at law, and am assistant attorney of the Dubuque & Sioux City Railroad Company; that within the past few days, and not before, I have had an opportunity to examine the record in the case above named; that the said railroad company are materially interested in obtaining a correct decision of the principal point raised in said cause, and that I verily believe a decision of the point against the above-named defendant in error would prejudice the interest of said Dubuque & Sioux City R. R. Company, although not a party to the record in the above-named case. The decision made by the court below (Hon. Wm. D. Shipman) is the point on which rests the title to above seventy-seven thousand acres of land granted by Congress to aid in the construction of said Dubuque & Sioux City railroad.

93 Further, that I have reason to fear that said Burr is not a *bona fide* litigant, but, on the contrary, is desirous of obtaining a decision against himself with a view to prejudicing the title of the Dubuque & Sioux City Railroad Company and their grantees.

Signature to the foregoing affidavit.
(Signed) JAMES M. McKINLEY.

Subscribed and sworn to before me, the clerk of the district court of Dubuque county, Iowa, this 1st day of February, 1866.

Witness my hand and official seal.

[SEAL.] (Signed) M. LEPPER, *Clerk.*

True copy. Test:

[SEAL.] D. W. MIDDLETON,

Clerk Sup. Court U. S.

(Endorsed as follows:) The Des Moines Navigation & Railroad Company, plaintiff in error, *vs.* Calvin Burr. Affidavit of James M. McKinley. Filed Feb., 1866. George B. Corkhill, clerk.

Motion on Behalf of the Iowa Homestead Company and Their Grantees to Intervene for the Purpose of Argument.

In the Supreme Court of the United States. Dec. Term, 1866.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, Plaintiff in Error,
vs.
CALVIN BURR, Defendant in Error.
No. 133. Land.

Now, to wit, December 14, 1866, come the Iowa Homestead Company and their grantees, of the State of Iowa, and by their attorney, John F. Duncombe, move the Court to permit said parties to intervene in this cause for the purpose of argument on the part of the defendant in error, and for cause state—

1. That said company and their grantees are directly interested in the decision of this cause in this, to wit, said company and their grantees claim to be owners in fee-simple of the land named in the pleadings, and over fifty thousand acres of other lands, the
94 title to which is involved in the decisions of the legal questions involved in this suit.

(Signed) J. F. DUNCOMBE,

Attorney for Intervener.

True copy. Test:

[SEAL.] D. W. MIDDLETON,

Clerk Supreme Court U. S.

Endorsed as follows: Supreme Court U. S. December term, 1866. Des Moines Navigation & Railroad Company, plaintiffs in error, *vs.* Calvin Burr. Motion on part of Iowa Homestead Company to intervene for argument. Filed 14th December, 1866. Granted J. F. Duncombe, for interveners.

C.—Docket Entries and Extracts from Minutes Supreme Court United States in The Des Moines Navigation & Railroad Company, Plaintiff in Error, vs. Calvin Burr.

Supreme Court of the United States. December Term, 1865.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION & RAILROAD CO.
No. 303.

In error to the circuit court of the United States for the southern district of New York.

J. W. Gilbert; P. Smith (for intervener); Chas. Tracy; Litchfield.

Docket entries:

1865, Nov. 27.—Record received and filed.
" Dec. 21.—Stipulation to submit filed.
" " Brief of J. W. Guilbert, for the plaintiff in error, filed.
" " Brief of Litchfield, for the def't in error, filed.
1866, Jan. 2.—Submitted under 20th rule.
" Feb. 8.—Motion of Mr. Allison for leave to intervene and also for leave to file printed argument.
95 1866, Feb. 8.—Affidavit of J. M. McKinley filed.
" " 13.—Leave granted intervener to file argument before first of March.
1866, Feb. 21.—Brief of P. Smith, for intervener, filed.
" " 26.—On motion of Mr. Cook, leave granted him to file argument before 1st March.
" Mar. 12.—Ordered to be continued to the next term, with leave to any of the parties to file additional arguments.
" " 23.—Brief of Mr. B. C. Cook, for intervener, filed.

No. 204, of December term, 1866. Docket entries continued:

1866, Dec. 4.—Reply brief of Litchfield filed.
" " 17.—Ordered that counsel have leave to argue this case with No. 133, if desired.
1867, May 13.—Adjudged to be affirmed with costs.

Extracts from Minutes.

Supreme Court of the United States. December Term, 1865.
No. 303.

* * * * * * *

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION & RAILROAD CO.
No. 303.

This cause was submitted to the consideration of the Court on the record and printed arguments by Mr. Guilbert, of counsel for the plaintiff in error, and by Mr. Litchfield, for the defendant in error, under the 20th rule.

2d January, 1866.

Samuel G. Wolcott, Plaintiff in Error,
vs.
The Des Moines Navigation & Railroad Co. } No. 303.

On consideration of the motion made and affidavit filed in this cause on the 8th instant, it is now here ordered by the Court
96 that leave be, and the same is hereby, granted counsel of the Dubuque & Sioux City Railroad Company to file and submit printed arguments in this cause at any time before the first day of March next.

13th February, 1866.

Samuel G. Wolcott, Plaintiff in Error,
vs.
The Des Moines Navigation & Railroad Co. } No. 303.

On motion of Mr. B. C. Cook, leave granted him to file a printed argument in this cause by the first Monday of March next.

26th February, 1866.

December Term, 1866.

Samuel G. Wolcott, Plaintiff in Error,
vs.
Des Moines Navigation & Railroad Co. } No. 204.

Ordered by the Court that this cause be argued by counsel, if desired, with No. 133, when reached in the regular call of the docket.

Supreme Court of the United States. December Term, 1866.

Samuel G. Wolcott, Plaintiff in Error,
vs.
The Des Moines Navigation & Railroad Co. } No. 204.

In error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of New York, and was argued by counsel.

On consideration whereof it is now here ordered and ad-
97 judged by this Court that the judgment of said circuit court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. Justice Nelson.

13th of May, 1867.

Mr. Justice Miller took no part in the decision of this case.

True copies of docket entries, extract from minutes, and judgments.

Test:

[SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

Supreme Court of the United States. December Term, 1865.

Samuel G. Wolcott
vs.
The Des Moines Navigation & Railroad Co. } No. 303.

The counsel for the plaintiff and the counsel for the defendant hereby agree to submit, and do submit, this case upon printed arguments.

Dated December 18, 1865.

(Signed) J. W. GILBERT,
Of Counsel for Plaintiff.

(Signed) EDWIN C. LITCHFIELD,
Of Counsel for Defendant.

True copy. Test:
[SEAL.] D. W. MIDDLETON,
Clerk Sup. Court U. S.

Endorsed as follows: Stipulation to submit. Filed December 21, 1865.

98 Supreme Court of the United States. December Term, 1865.

Samuel G. Wolcott, Plaintiff in Error,
vs.
Des Moines Navigation & Railroad Co. } No. 303.

In error to the circuit court of the United States for the southern district of New York.

The Dubuque and Sioux City Railroad Company, a corporation, and by Wm. B. Allison, its attorney, now comes and moves the Court for leave to intervene in the above-entitled cause as a party thereto, and also for leave to file an argument in same for reasons set forth in affidavit filed herewith and made a part hereof.

DUBUQUE & SIOUX CITY
RAILROAD COMPANY,
(Signed) By WM. B. ALLISON, *Its Att'y.*

True copy. Test:
[SEAL.] D. W. MIDDLETON,
Clerk Sup. Court U. S.

Endorsed as follows: No. 303. Samuel G. Wolcott, plaintiff in error, *vs.* Des Moines Navigation and Railroad Company. Motion for leave to intervene on behalf of Dubuque & Sioux City Railroad Company. Filed 8th February, 1866. Wm. B. Allison.

Supreme Court of the United States. December Term, 1865.

SAMUEL G. WOLCOTT, Plaintiff in Error,

vs.

DES MOINES NAVIGATION & RAILROAD CO.

In error to the circuit court of the United States for the southern district of New York.

I, James M. McKinley, on oath say that I am an attorney and counsellor at law, and am assistant attorney for the Dubuque & Sioux City Railroad Company; that within the past few
99 days, and not before, I have had an opportunity to examine the record in the above-named case; that, to my mind, the said record shows that the attorneys of said Wolcott either did not fully understand their case or the nature of the party opposed to them, or had been instructed not to litigate the case in good faith; that the question involved in said case is one on which depends the title which the Dubuque & Sioux City Railroad Company acquired to about seventy-seven thousand acres of land to aid in the construction of said road; that a final decision of the above-named case against the plaintiff in error would tend to greatly prejudice the said Dubuque & Sioux City Railroad Company, although they are not a party to the said case; that I have reason to fear the decision of the court below (near bottom of page 61 of the record) was obtained on substantially an *ex parte* presentation of the case, and is greatly prejudicial to the interest of the Dubuque & Sioux City Railroad Company, and is contrary to what would have been the decision on a proper presentation and argument of the case. And, as aforesaid, that an affirmance of the judgment of the court below would prejudice the title acquired by said Dubuque & Sioux City Railroad Company to said seventy-seven thousand acres of land and the title to their grantees.

(Signed) JAMES M. McKINLEY.

Subscribed and sworn to by James M. McKinley before me, clerk of the district court of Dubuque, Iowa, February 1, 1866.

Witness my hand and official seal.

[SEAL.] (Signed) M. LEPPER, *Clerk.*

True copy. Test:

[SEAL.] D. W. MIDDLETON,
Clerk Sup. Court U. S.

Endorsed as follows: No. 303. Samuel G. Wolcott, plaintiff in error, *vs.* Des Moines Navigation & Railroad Company. Affidavit of James M. McKinley. Filed 8th February, 1866.

100 *CI.—The Argument of Platt Smith in Behalf of the Dubuque & Sioux City Railroad Company in Wolcott vs. The Des Moines Navigation & Railroad Company.*

Supreme Court of the United States. December Term, 1866.

Samuel G. Wolcott, Plaintiff in Error,
vs.
Des Moines Navigation & R. R. Co., Def'ts in Error.

Argument of Platt Smith, who intervenes in behalf of the Dubuque & Sioux City Railroad Company.

Both of these cases come up from the circuit court of the United States from the southern district of New York. They are both upon the same identical issues, and substantially upon the same state of facts. They are both suits brought against the Des Moines Navigation & Railroad Company to recover damages for alleged failure of title to certain lands in Iowa conveyed by the defendant below to the plaintiffs below by warranty deed. The plaintiffs below are citizens of the State of New York, and the defendant below is a citizen of Iowa.

The lands in dispute lie within five miles of the Des Moines river and above the mouth of the Raccoon Forks and in the alternate odd-numbered sections; and they also lie within the six and fifteen mile limits of the Dubuque & Sioux City Railroad Company, and are included in the act of Congress granting lands to Iowa, passed May 15th, 1856. The Des Moines Navigation & Railroad Company claim title to these lands under an act of Congress, passed August 8th, 1856, granting lands to Iowa to aid in the improvement of the navigation of the Des Moines river, and under grants and deeds from the State of Iowa to said company, and also under a joint resolution of Congress passed March 2d, 1861, and under an act of Congress passed July 11th, 1862.

The Dubuque & Sioux City Railroad Company claim title to the
same lands under an act of Congress passed May 15th, 1856,
101 granting lands to Iowa to aid in the construction of certain
railroads and grants from the State of Iowa to the Dubuque
& Pacific Railroad Company and conveyances from said company
to the Dubuque & Sioux City Railroad Company.

Three questions are raised by the records in these causes:

First. Did the act of Congress passed August 8th, 1846, grant the lands in dispute to the State (then Territory) of Iowa for the purposes specified in the act?

Second. Did the act of Congress of May 15th, 1856, grant the lands in dispute to the State of Iowa for the purpose specified in said act, and did the act vest the title to said lands in dispute in the State of Iowa, or were the lands in dispute reserved to the United States, so that said act of May 15th, 1856, did not operate to vest them in the State of Iowa?

Third. Did the joint resolution of Congress passed March 2d, 1861, or the act of July 12th, 1862, pass the title to the lands in dispute to the State of Iowa and through said State to the Des Moines Navigation & Railroad Company?

102 The foregoing is all the evidence offered or introduced by the parties or either of them at the final trial or hearing of said suit.

After due consideration the court rendered the following decree:

103 This cause was submitted for final decision on the 13th day of March, A. D. 1883, the parties then consenting and court making an order to the effect that the cause should be taken under advisement, and the decision be rendered and the decree entered in vacation as of the 13th day of March, A.D. 1883. Said cause has been conducted, submitted, and tried by the parties thereto as a cause in equity, and now, on this 2d day of October, 1883, the court finds that the said Iowa Homestead Company, plaintiff, is entitled to recover the principal sums of money shown to have been paid, but holds and decides that plaintiff can recover interest thereon only from the commencement of this suit—that is, the 5th day of August, A. D. 1876.

It is, therefore, ordered and adjudged that plaintiff have and recover of and from the said Des Moines Navigation & Railroad Company, defendant, the sum of $7,197.30, and interest thereon from March 13th, 1883, and costs of suit, taxed at — dollars, and that plaintiff have execution therefor.

And afterwards the plaintiff, The Iowa Homestead Company, gave due notice and perfected its appeal to the supreme court of Iowa from the decision of the said district court.

GEORGE CRANE,
Attorney for Appellant.

Assignment of Errors.

1. The court erred in not computing interest from time of payment of taxes to the county.
2. The court erred in not giving plaintiff the whole relief prayed for.

GEORGE CRANE,
Attorney for Plaintiff.

104 Endorsed.

"Received copy of this abstract this 1st day of November, 1883.

C. H. GATCH,
Att'y for Def't."

105 "It is hereby stipulated & agreed that this cause, including the cross-appeal of the defendant, due notice of which is hereby admitted, may be submitted to and tried by the supreme court of Iowa on this record, and the assignment of errors hereafter to be filed by defendant.

Signed this 18th day of Dec., 1883.

GEORGE CRANE,
Att'y for Pl'ff.
C. H. GATCH,
Att'y for Def't.

George Crane, att'y for plaintiff, signed after interlineation."

"It is hereby stipulated and admitted that the foregoing is all the evidence—that is, from page- one to 110—that was offered or introduced at the trial of the above-entitled suit of The Iowa Homestead Company *vs.* Des Moines Navigation & Railroad Company.

Signed this 1st day of Nov., 1883.

GEORGE CRANE,
Att'y for Pl'ff.
C. H. GATCH,
Att'y for Def't."

106 And on the 29th day of January, 1884, the defendant (pl'ff in error) filed in the office of the clerk of said court an additional abstract, the same, with the endorsements thereon, being in the words and figures following, to wit:

107 *Additional Abstract.*

In the Supreme Court of Iowa. January Term, Des Moines, A. D. 1884. In Equity.

THE IOWA HOMESTEAD CO.
vs.
THE DES MOINES NAVIGATION & RAILROAD CO.

Appeal from the Webster district court.

Geo. Crane, attorney for appellant; C. H. Gatch, attorney for appellee.

On the 22d day of May, 1882, plaintiff filed following motion, and showing for change of venue:

I, Edward K. Goodnow, being first duly sworn, depose and say that I am plaintiff in the above-entitled action; that D. D. Miracle, judge of this court, is, to the best of my knowledge and belief, so prejudiced against me that I cannot obtain a fair trial before him, and that the existence of such prejudice was not known to me before the last continuance of this cause.

E. K. GOODNOW.

Duly verified.

John I. Mullany, Edwin B. Farley, and W. P. Dyer, being first duly sworn, depose and say that they are not related to the plaintiff in this action nearer than the fourth degree, nor do they nor any of them stand in the relation of servant, agent, or employé of said plaintiff, nor are they in any manner interested in the result or issues of this action, and they do verily believe that the
108 Hon. D. D. Miracle, judge of the circuit court of Iowa in and for Webster county, is so prejudiced against said plaintiff that he cannot obtain a fair trial of said cause before said judge, and such prejudice was unknown to plaintiff before the last continuance.

JOHN I. MULLANY.
EDWIN B. FARLEY.
W. P. DYER.

Duly verified.

Which motion was on the same day by the court sustained, and defendant at the time excepted to the order sustaining the same.

Assignment of Errors on Defendant's Appeal.

1st. The court erred in sustaining plaintiff's motion for change of venue.

2d. The court erred in holding plaintiff's claim not barred by the statute of limitations of the State of Iowa.

3d. The court erred in holding that plaintiff was not estopped from prosecuting this suit by the former adjudication in the said former suit of The Iowa Homestead Company *vs.* The Des Moines Navigation & Railroad Company and others.

4th. The court erred in allowing any recovery in this suit.

C. H. GATCH,
Attorney for Defendant.

Endorsed: "Due service of the within is accepted this 26th day of Jan'y, 1884. George Crane, att'y for The Iowa Homestead Co."

109 Said cause was duly submitted to said supreme court on the foregoing record, and after due consideration said court, on the 23d day of April, 1884, filed its opinion or decision of said cause, the same being duly entered of record, in the words and figures following, to wit:

"IOWA HOMESTEAD CO., Appellant,

vs.

DES MOINES NAVIGATION & RAILROAD COMPANY.

Appeal from Webster district court.

George Crane, for appellant; C. H. Gatch, for appellee.

BECK, *J:*

The issues and facts in this case involved in the questions made and discussed by the counsel of the respective parties are identical with those considered and determined in the third, fourth, sixth, and seventh points of the opinion in Goodnow *v.* Litchfield, filed this day. The questions discussed in the second and eighth points of that opinion are not raised by the pleading nor discussed in this case by counsel. The petition in this case did claim a lien, the right to which is considered in the eighth point of the foregoing opinion, but the claim by an amendment was afterwards withdrawn.

The question of former adjudication, discussed in the fifth point of the foregoing opinion, is not discussed by counsel for defendant in this case in his printed brief, though it was pleaded as a defense. Counsel for plaintiff in this case filed a printed brief used in the former case, but upon the fifth point it is not at all applicable, for the reason that the facts involved in the pleas of former adjudication are not identical in each case. The two cases were discussed at the oral argument together, all the points involved in each case being considered, but we were left to the printed briefs and abstracts in order to make application of the arguments properly to the separate cases. Since the submission of the cases counsel for each party has been called upon to express his understanding of the points to be determined in the cases separately. Counsel for defendant claims that the question of prior adjudication, while not presented in his printed brief, was argued orally, and is, therefore, in this case; counsel for plaintiff claims that it is not. Certain is it that it is not made in the printed brief for defendant, and we are unable to say that it was made on the oral agreement as applicable to this case. The counsel for defendant having failed to present this point in his brief, he cannot, according to the spirit of our rules, urge it in oral argument. In view of the want of agreement between counsel, we are required to hold that the question of prior adjudication cannot be determined in this case.

Following the decision of the preceding case (Goodnow *v.* Litchfield), the decree of the district court will be reversed, and the cause will be remanded for a decree in harmony with that opinion; or, at plaintiff's option, such a decree will be entered in this court. It will be remembered that no bar is claimed in this case as in the other.

Reversed.

110 The plaintiff having elected to take a final decree in the supreme court of Iowa, in accordance with the foregoing opinion, the following judgment and decree, after being approved by said court, was entered of record as of the regular June term, 1884, of said court:

Final Judgment and Decree.

"THE IOWA HOMESTEAD COMPANY
vs. } 10768.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY.

This cause coming on for final hearing, the Iowa Homestead Company, appearing by its attorney, George Crane, and the Des Moines Navigation and Railroad Company, by its attorney, C. H. Gatch, and the court, having duly considered the evidence, the issues, and the arguments of counsel, finds that the plaintiff is entitled to recover the principal sums of money shown to have been paid, and interest thereon from the times of payment:

111 It is, therefore, ordered, adjudged, and decreed that plaintiff have and recover of and from the said Des Moines Navigation & Railroad Company, defendant, the sum of nine thousand two hundred & eleven & $\frac{68}{100}$ dollars, and interest thereon at the rate of six per cent. per annum from the 13th day of March, A. D. 1883, and costs of suit, taxed at two hundred nineteen & $\frac{95}{100}$ dollars, and that plaintiff have execution therefor."

And afterwards a supplemental decree or certificate was allowed on motion of defendant and duly entered of record in the following form:

"THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION & R. R. CO. } 10768.

And now, on the application of the defendant, it is certified by
112 the court here and ordered to be made part of the record herein
that by the answer of the defendant in defendant's assignment of errors in the additional abstract, and on the hearing in said cause, the defendant claimed immunity from the entire demand and claim of plaintiff on the ground that, as it claimed, the same demand and claim had been adjudicated against plaintiff by the Supreme Court of the United States in the case of The Iowa Homestead Company against The Des Moines Navigation & Railroad Company, this defendant, and others, at the October term thereof, A. D. 1872, and that our decision herein was and is against the immu-ty so claimed by defendant.

And it is further certified and ordered to be made part of the record herein that by defendant's answer, and on the hearing in said cause, defendant claimed immunity from said entire claim and
demand, because, as was claimed, the alleged cause of action,
113 not having accrued within six years immediately preceding
the commencement of the action, was barred by the Iowa statute of limitations, and that to determine whether or not it was so barred it became material and necessary to decide whether or not the decision of the Supreme Court of the United States in the case of Samuel G. Wolcott against The Des Moines Navigation & Railroad Company was a final determination of the question therein decided in order to determine when the plaintiff's cause of action accrued, and that our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed because of our said decision that said determination was not final.

Given under my hand, at Cedar Rapids, this 19th day of June, 1884.

JAS. H. ROTHROCK,
Ch. Justice of the Sup. Court of Iowa."

114 And afterwards, on the 22d day of July, 1884, plaintiff
filed a motion to correct or change the foregoing supplemental decree or certificate, because the question whether the former adjudication set up in the defendant's answer as a bar to plaintiff's action was not in fact passed upon or decided by the court. And the court, having duly considered said motion, sustained the same on the 23d day of July, 1884, it still being of the regular June term of said court, and the following order in relation thereto is duly entered as part of the record herein:

"THE IOWA HOMESTEAD CO.
vs. } 10768.
THE DES MOINES NAVIGATION & R. R. COMPANY.

Now on this day plaintiff's motion for correction of certificate is
sustained, and it is ordered that the certificate signed in this
115 case by the chief justice, of the date of June 19th, 1884, be
amended as follows: Strike out all of said certificate as shown by erasures now made thereon, and such certificate as corrected is as follows:

And now, on the application of the defendant, it is certified by the court here, and ordered to be made part of the record herein, that by defendant's answer, and on the hearing in said cause, defendant claimed immunity from said entire claim and demand because, as was claimed, the alleged cause of action not having accrued within six years immediately preceding the commencement of the action was barred by the Iowa statute of limitations, and that to determine whether or not it was so barred it became material and necessary to decide whether or not the decision of the Supreme Court of the
United States in the case of Samuel G. Wolcott *vs.* *against* The
116 Des Moines Navigation & Railroad Company was a final de-
termination of the question therein decided, in order to determine when the plaintiff's cause of action accrued, and that our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed because of our said decision that said determination was not final."

And said certificate as so amended remains endorsed and signed
by the chief justice of said court as first shown.

117 And on the 15th day of July, 1884, there was filed in the
office of the clerk of said court a writ of error, a true copy of which is retained in said office, and the original is hereto attached, marked as page 123, and returned herewith; and there was also filed in the office of the clerk of said court a citation, a true copy of which is retained in said office, and the original is hereto attached as page 124, and returned herewith.

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said supreme court before you, between the Iowa Homestead Company and the Des Moines Navigation and Railroad Company, wherein was drawn in question the validity of the authority exercised under the State of Iowa, on the ground of its being repugnant to the laws of the United States, and the decision was in favor of the validity of such authority, and wherein certain rights, priv*elag*es, and immunities were claimed under a certain judgment of the Supreme Court of the United States and authority exercised under the United States, and

the decision was against the rights, privelages, and immunities so claimed, a manifest error hath happened, to the great damage of the said Des Moines Navigation and Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, shall
be duly corrected and full and speedy justice done to the par-
119 ties aforesaid in this behalf, do command you, if judgment
be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, *of* the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 15th day of July, A. D. 1884.

[Seal U. S. Circuit Court, Southern District Iowa.]

E. R. MASON,
Clerk of U. S. Circuit Court, Southern District of Iowa.

Approved July 14th, 1884.
JAMES H. ROTHROCK,
Chief Justice of the Supreme Court of the State of Iowa.

[Endorsed:] Iowa Homestead Company *vs.* Des M. Nav. & R. R. Co. Writ of error. Filed July 15, 1884. G. B. Pray, clerk sup. court.

120 The United States of America to the Iowa Homestead Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein the Des Moines Nav. & R. R. Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James H. Rothrock, chief justice of the supreme court of the State of Iowa, this 14th day of July, in the year of our Lord one thousand eight hundred and eighty-four.

JAMES H. ROTHROCK,
Chief Justice Supreme Court of Iowa.

121 [Endorsed:] 10768. Iowa Homestead Co. *vs.* Des M. Nav. & R. R Co. Citation.

Due service of the within is hereby acknowledged this 16 day of July, 1884.

GEORGE CRANE,
Att'y for the Iowa Homestead Co.

122 On the 15th day of July, 1884, a writ of error bond was filed in the office of the clerk of the supreme court of Iowa, which said bond remains lodged in said office, being in the words and figures following, to wit:

"Know all men by these presents that we, the Des Moines Navigation & R. R. Company and James Callanan, are held and firmly bound unto the Iowa Homestead Company in the full and just sum of $500, to be paid to the said Iowa Homestead Company or its successors; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, & administrators and successors, jointly and severally, by these presents.

Signed with our hands and dated this 12th day of July, 1884.

Whereas lately at a term of the supreme court of Iowa, in a suit depending in said court between the Iowa Homestead
123 Company, plaintiff, and the Des Moines Nav. & R. R. Co., defendant, judgment was rendered against the said Des Moines Navigation & R. R. Company, and the said Des Moines Navigation & R. R. Company having obtained a writ of error and filed a copy thereof in the clerk's office of said court to remove the judgment in the aforesaid suit, and a citation directed to the said Iowa Homestead Company, admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., the second Monday of October next:

Now, the condition of the above obligation is such that if the said Des Moines Navigation & R. R. Co. shall prosecute said writ of error to effect and answer all costs if it fail to make its appeal good, then the above obligation to be void; otherwise in full force and virtue.

THE DES MOINES NAVIGATION
& RAILROAD COMPANY,
By C. H. GATCH, *Its Attorney.*
J. CALLANAN, *Security.*"

Endorsed: "The within bond is hereby approved this 14th day of July, 1884. James H. Rothrock, chief justice sup. court of Iowa."

124 STATE OF IOWA, *ss:*

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings in said cause, being the abstracts filed by both parties, supreme court opinion or decision, final judgment, supplemental decree or certificate, said certificate as amended, and writ of error bond.

I further certify that the original writ of error and citation are hereto attached and returned herewith, copies thereof being re-the decision was against the rights, privelages, and immunities so claimed, a manifest error hath happened, to the great damage of the said Des Moines Navigation and Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, *of* the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done. 119

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 15th day of July, A. D. 1884.

[Seal U. S. Circuit Court, Southern District Iowa.]

E. R. MASON,
Clerk of U. S. Circuit Court, Southern District of Iowa.

Approved July 14th, 1884.
JAMES H. ROTHROCK,
Chief Justice of the Supreme Court of the State of Iowa.

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Witness the Honorable James H. Rothrock, chief justice of the supreme court of the State of Iowa, this 14th day of July, in the year of our Lord one thousand eight hundred and eighty-four.

JAMES H. ROTHROCK,
Chief Justice Supreme Court of Iowa.

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Signed with our hands and dated this 12th day of July, 1884.

Whereas lately at a term of the supreme court of Iowa, in a suit depending in said court between the Iowa Homestead
123 Company, plaintiff, and the Des Moines Nav. & R. R. Co., defendant, judgment was rendered against the said Des Moines Navigation & R. R. Company, and the said Des Moines Navigation & R. R. Company having obtained a writ of error and filed a copy thereof in the clerk's office of said court to remove the judgment in the aforesaid suit, and a citation directed to the said Iowa Homestead Company, admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., the second Monday of October next:

Now, the condition of the above obligation is such that if the said Des Moines Navigation & R. R. Co. shall prosecute said writ of error to effect and answer all costs if it fail to make its appeal good, then the above obligation to be void; otherwise in full force and virtue.

THE DES MOINES NAVIGATION
& RAILROAD COMPANY,
By C. H. GATCH, *Its Attorney.*
J. CALLANAN, *Security.*"

Endorsed: "The within bond is hereby approved this 14th day of July, 1884. James H. Rothrock, chief justice sup. court of Iowa."

124 STATE OF IOWA, *ss:*

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings in said cause, being the abstracts filed by both parties, supreme court opinion or decision, final judgment, supplemental decree or certificate, said certificate as amended, and writ of error bond.

I further certify that the original writ of error and citation are hereto attached and returned herewith, copies thereof being retained in my office, and this return is made in obid-ence to said writ of error.

In testimony whereof witness my signature and the seal of said court, at Des Moines, in said State, this 9th day of August, 1884.

[Seal of the Supreme Court of Iowa.]

G. B. PRAY,
Clerk Supreme Court State of Iowa.

Endorsed on cover: Iowa supreme court. No. 320. The Des Moines Navigation and Railroad Company, plaintiff in error, *vs.* The Iowa Homestead Company. Filed 26th September 1884.

23-552

123-552

Office Supreme Court U. S.
FILED.
MAY 9 1887
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1886.

No. ~~320.~~ 45

THE DES MOINES NAVIGATION & RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE IOWA HOMESTEAD COMPANY,
DEFENDANT IN ERROR.

ON ERROR FROM THE SUPREME COURT OF IOWA.

ARGUMENT FOR PLAINTIFF IN ERROR.

C. H. GATCH AND WM. CONNOR, FOR PLAINTIFF IN ERROR.
GEO. CRANE, FOR DEFENDANT IN ERROR.

P. C. Kenyon, Publisher Law Briefs, Des Moines.

IN THE

Supreme Court of the United States

THE DES MOINES NAVIGATION AND RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE IOWA HOMESTEAD COMPANY,
Defendant in Error.

No. 320.

On Error from the Supreme Court of Iowa.

C. H. Gatch and William Connor, *for Plaintiff in Error.*

Geo. Crane, *for Defendant in Error.*

ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

At the October term, 1868, of the district court of Webster county, Iowa, the Iowa Homestead Company, defendant in error, an Iowa corporation, commenced a suit against the Des Moines Navigation & Railroad Company, another Iowa corporation, and numerous grantees of the latter, to establish title in said homestead company to the so-called "Des Moines river lands," and with a view to alternative relief, in the event of an adverse decree on the question of title, made the following allegation in its petition:

> The said plaintiffs have been in possession of the lands claimed by them, themselves or their grantees in contract, *since 1861*. They have paid the taxes thereon to the state of Iowa *since*, in all amounting to eighty thousand dollars, and if their title has failed, they are entitled to have their taxes refunded *since 1861*, by the holder of the legal title who has not paid them. (Fol. 25.)

And prayed—

> That in the event of a decree that the plaintiff's present title or any part of it has failed, the said Des Moines Navigation & Railroad Company and its assigns may be decreed to repay the plaintiff all the taxes which he has paid on said land and interest thereon. (26.)

The answer to this part of the petition is as follows:

> As to whether or not the said complainant and its vendees have been in possession of and paid said taxes on the lands claimed by them since 1861, to the amount of eighty thousand dollars, this defendant is ignorant and uninformed save by the said complainant's said bill of complaint, but expressly avers that the possession of the said lands by the said complainant and its vendees since 1861, is and has been unauthorized and wrongful. (28.)

The suit was commenced in the district court of Webster county, Iowa, and was thence transferred to the circuit court of the United States for Iowa. At the final hearing in the circuit court the petition was dismissed. On appeal to this court the decision below was affirmed, and the right to recover the taxes paid was denied.

On the question of the complainant's right to the alternative relief claimed, this court, in *Homestead Company vs. Valley Railroad*, 17 Wall., p. 167, said:

> It is true, in accordance with our decision, that the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well established rule as to voluntary payments. If the appellants, owing to their too great confidence in their title have risked too much, it is their misfortune; but they are not, on that account, entitled to have the taxes voluntarily paid by them refunded by the successful party in this suit.

In the two cases of the *Dubuque & Sioux City Railroad Co. vs. the Supervisors of Webster county, Iowa*, and *Iowa Homestead Co. vs. same*, 40 Iowa, 16, the question was, as to the right of recovery of these identical taxes, by the defendant in error, from Webster county, and it was held that such recovery could not be had, for the reason stated in the following extracts from the opinion:

> The payments having been made *voluntarily*, with knowledge of all the facts, believing that under the law, the lands belonged to the plaintiffs; the mistake was one of law, and no action at the common law or in equity lies to recover the money thus paid. Page 17.

It will thus be seen that the sole ground upon which the right of recovery was denied, was, that the payment of the taxes had been voluntary.

In *Garrigan vs. Knight*, 47 Iowa, 525, it was held that —

> When the title to real estate is in controversy, and the taxes thereon are voluntarily paid by one of the parties to the controversy, whose claim is afterwards adjudged to be invalid, he cannot recover the amount so paid from the owner.

The decision in this case has never been overruled otherwise than by being in conflict with later decisions in the numerous "Goodnow cases," of the same character as the case at bar.

In the first of these, the case of *Goodnow vs. Moulton*, 51 Ia., 555, prosecuted by Goodnow as assignee of the homestead company for the recovery of part of these same taxes, the defense of voluntary payment having been relied upon, and the case of *Homestead Company vs. Valley Railroad* having been cited as authority, the supreme court of Iowa, very strangely overlooking the above quoted paragraph of the opinion in that case, say, in their opinion, page 560:

> We have looked in vain for anything in the statement of the questions involved or the opinion of the court, which tends to show with any degree of certainty, that the right of the plaintiff to recover the taxes paid was in the case.

And more strangely still, in the subsequent case of *Goodnow vs. Stryker*, 62 Iowa, 223, now also pending here, after having discovered the oversight in the Moulton case, it is said:

> Since the decision in *Goodnow vs. Moulton*, we cannot follow the decision in *Iowa Homestead Company vs. Des Moines Navigation & Railroad Company*.

The question of voluntary payment having been thus disposed of, it became necessary in the same case, to dispose of the further defense relied on, that the claim was barred by the New York statute of limitations, and this involved the real and decisive question, *when* and *how* did the cause of action accrue, which the opinion thus discusses and determines.

> We do not think a cause of action accrued upon each payment at the time it was made, nor upon all at the time the last one was made. The implied promise upon which the action is based, arose by reason of the circumstances. See *Goodnow vs. Moulton*, above cited. One very important circumstance was that the title was involved in serious litigation which was not terminated in the defendant's favor *until 1873*. We do not think the defendant's implied promise could be regarded as absolute. He certainly never promised to pay these taxes in case the title should be adjudicated to be in the Iowa Homestead Company, and no one had any reason to suppose he intended to incur any such liability. The most that can be said then in regard to the defendant's implied promise is, that it was based upon a contingency, and being so, it was not enforcible until the contingency had happened. We think that the cause of action did not arise until the termination of the litigation by which the title was adjudged to be in the defendant.

Plaintiff in error, accepting this as settling the proposition that a cause of action accrued to the homestead company by "the termination of the litigation by which the title was adjudicated to be in the defendant," the Des Moines Navigation & Railroad Company, plead as one of his defenses in this case, the Iowa statute of limitations (8), under the laws of which state it had and still has its corporate existence, relying on the decisions of this court in the cases of *Wolcott vs. The Des Moines Company*, and *The Des Moines Company vs. Burr*, 5 Wall., 681 and 689, decided *in 1866*, as being *such termination of that litigation.*

The following is the certificate as originally entered of record with the subsequent modification and record of same, which, with the foregoing, will constitute a sufficient statement of the case, and will show how the questions to be made in argument have become vital in this case by reason of the previous decisions of the supreme court of Iowa in other similar cases:

CERTIFICATE.

THE IOWA HOMESTEAD COMPANY,
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY.

And now on the application of the defendant, the Des Moines Navigation Company, it is certified by the court here, and ordered to be made part of the record herein, that by the answer of defendant, in defendant's assignment of errors in the additional abstract, and on the hearing in said cause, the defendant claimed immunity from the entire demand and claim of plaintiff, on the ground that, as he claimed, the same demand and claim had been adjudicated against plaintiff by the supreme court of the United States, in the case of *The Iowa Homestead Company vs. The Des Moines Navigation & Railroad Company*, this defendant and others, at the October term thereof, A. D. 1872, and that our decision herein was and is against the immunity so claimed by defendant.

And it is further certified and ordered to be made part of the record herein, that by defendant's answer and on the hearing in said cause, defendant claimed immunity from said entire claim and demand, because, as was claimed, the alleged cause of action not having accrued within six years immediately preceding the commencement of the action, was barred by the Iowa statute of limitations, and that to determine whether or not it was so barred, it became material and necessary to decide whether or not the decision of the supreme court of the United States, in the case of *Samuel G. Wolcott vs. The Des Moines Navigation & Railroad Company*, was a final determination of the question therein decided, in order to determine when the plaintiff's cause of action accrued, and our decision herein was and is that said decision was not a final determination of said question was and is against the immunity so claimed because of our said decision that said determination was not final.

And afterwards, on the 22d day of July, 1884, plaintiff filed a motion to correct or change the foregoing supplemental decree or certificate because the question, whether the former adjudication set up in the defendant's answer as a bar to plaintiff's action was not, in fact, passed upon or decided by the court. And the court having duly considered said motion, sustained the same on the 23d day of July, 1884, it still being of the June term of said court, and the following order in relation thereto is duly entered as part of the record herein.

THE IOWA HOMESTEAD COMPANY,
vs.
THE DES MOINES NAVIGATION &
RAILROAD COMPANY.

Now on this day plaintiff's motion for correction of certificate is sustained, and it is ordered that the certificate signed in this case by the chief justice, of the date of June 19, 1884, be amended as follows: Strike out all of said certificate as shown by erasures now made thereon, and such certificate as corrected is as follows:

It is hereby certified and ordered to be made part of the record herein, that by defendant's answer and on the hearing in said cause, defendant claimed immunity from said entire claim and demand, because, as was claimed, the alleged cause of action not having accrued within six years immediately preceding the commencement of the action, was barred by the Iowa statute of limitations, and that to determine whether or not it was so barred, it became material and necessary to decide whether or not the decision of the supreme court of the United States, in the case of *Samuel G. Wolcott vs. The Des Moines Navigation & Railway Company*, was a final determination of the question therein decided, in order to determine when the plaintiff's cause of action accrued, and that our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed because of our said decision that said determination was not final.

ASSIGNMENT OF ERRORS.

Said supreme court of the state of Iowa erred,—

I. In deciding the meaning and effect of the decision of the supreme court of the United States in the case of *Wolcott vs. Des Moines Company*, 5 Wallace, 681, to be such as to defeat the defense of the Iowa statute of limitations, plead by plaintiff in error as a defense to the action; and thereby denying the immunity claimed by plaintiff in error under said decision, upon the true meaning and effect of which said supreme court of Iowa found and held said defense to depend.

II. In holding that defendant in error is not estopped from prosecuting his cause of action herein by the judgment of the supreme court of the United States in the case of the *Homestead Company vs. Valley Railroad*, 17 Wallace, 153; and thereby denying the immunity claimed by plaintiff in error by reason of that judgment, under the defense of former adjudication.

ARGUMENT.

It is claimed that the record presents two federal questions, either decided or the decision of which was necessary to the decree rendered by the supreme court of Iowa, the first of which was erroneously decided against the plaintiff in error, and the second of which was either also erroneously decided against it, or its decision was wrongfully and erroneously evaded. As to each, the question whether or not it is a *federal* question, so involves the question whether or not the decision was or was not erroneous, that the same argument will apply to both.

First. — The plaintiff in error claimed immunity from the demand of the defendant in error, because, *by force and virtue of the decision of this court* in the case of *Wolcott vs. Des Moines Company*, 5 Wall., 681, and the *Des Moines Company vs. Burr, Id.*, 689, the cause of action accrued, if ever, at the date of said decision, and was, therefore, at the commencement of this suit, barred by the statute of limitations of the state of Iowa.

The decision of this question, and the necessity therefor, by the supreme court of Iowa, are thus stated in the certificate (115-116).

> To determine whether or not it was so barred, it became necessary to decide whether or not the decision of the supreme court of the United States in the case of *Samuel G. Wolcott against the Des Moines Navigation & Railroad Company was a final determination of the question therein decided.* * * * And our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed *because of our said decision that said determination was not final.*

Second.—Whether or not the plaintiff in error was entitled to immunity from the demand of the defendant in error, *under the decision and judgment of this court* in the case of *Homestead Company vs. Valley Railroad*, 17 Wall., 153, the controversy therein having been, as plaintiff in error claims, and, as is alleged in its answer, between the same parties, and upon the same issue, and for the same demand, and the decision and judgment therein having been against the validity of such demand.

I.

Does the question, whether or not the decision of this court, in the case of *Wolcott vs. Des Moines Company*, 5 Wallace, 681, was a final determination of the question of title, as between the claimants under the railroad and river land grants, respectively, and the decision of the supreme court of Iowa, holding it not to have been, and thereby defeating the defense of the Iowa statute of limitations, present a federal question; and if so, was the decision of the supreme court of Iowa holding the decision in question not to have been such final determination, erroneous?

Since by the terms of the act of congress the right to the writ of error exists whenever an "immunity is claimed under authority exercised under the United States, and the decision is against the immunity claimed;" and as, in the language of the opinion of this court in *Murdock vs. City of Memphis*, 20 Wall., page 632: "It was no doubt the purpose of congress to secure to every litigant whose rights depended *on any question of federal law*, that the question should be decided for him by the highest federal tribunal"—in the contingency of an adverse decision by the state court, it seems plain enough that this case, on the remaining question, comes within both the terms and purpose of the law. Certain it is, from the certificate, that the claim of immunity under the defense of the statute of limitataions depended directly and absolutely on the effect to be given the former decision of this court in the Wolcott case; and it is equally certain that had the state court given to the decision in the Wolcott case the effect claimed for it by the plaintiff in error, the result would have been the immunity claimed.

The question upon which, in the Stryker case, referred to in the statement, the defense of the statute of limitations turned, was, whether the cause of action accrued at the dates of the respective payments of the taxes, or when the question of title was finally determined by the decision of this court, as between the claimants respectively, under the so-called river land and railroad grants; and, if at the date of the final decision of that question, whether or not the decision in the cases of Wolcott and Burr, 5 Wall., *supra*, was such final determination. How the question assumed that form is shown by the extract from the opinion in the case, copied into the statement.

The court having thus in effect made the question of defendant's liability to depend upon the time of "the termination of the litigation by which the title was adjudicated to be in defendant," the ultimate and precise question as shown by the certificate, as above quoted, upon which the case and defendant's liability turned, was, whether or not the decision of this court in the cases of Wolcott and Burr was a final adjudication of the question of title therein passed upon; in other words, *upon the effect to be given to a decision of this court.* While, in terms and immediately, immunity was claimed under the statute of limitations, yet the ultimate and essential ground upon which the claim must be allowed, if at all, was that, according to the true interpretation and effect of the decision in the cases just named, a cause of action thereby and of that date accrued to the defendant in error.

Can it make any difference how the question of immunity comes to depend on a question of federal law, provided only that it comes legitimately before the court, and does necessarily so depend?

Plaintiff in error maintained that the decision in these cases was a final determination of the question, while the court held that the question was not finally decided until 1873, meaning in the cases of *Williams vs. Baker*, 17 Wall., 144, and *Homestead Company vs. Valley Railroad*, *Id.*, 153, and, *because of so holding*, *necessarily* further held, that the action was not barred. From the contrary holding it would have *as necessarily* followed that the action was barred. There was no question requiring a construction in any respect of the Iowa statute of limitations, nor was its application to the case dependent upon any controverted fact proposition. The real and only question, therefore, was, whether or not the decision of this court in the Wolcott and Burr cases was *final* in such sense as that, according to the rule or doctrine laid down by the supreme court of Iowa, a cause of action then accrued. That decision was made in cases to which, by intervention, the defendant in error was a party, as will be seen by reference to the record (89–101). That the homestead company must be treated as having been a party to the Wolcott and Burr cases for the purposes of this question, is further evident from the following taken from the opinion of this court in *Williams vs. Baker*, 17 Wall., 144, referring to a complaint of collusion between the parties in the Wolcott and Burr cases, and the claim that for that reason it should not be treated as an authoritative adjudication. On pages 150–2, the court says:

> We must be permitted to question both the taste and legal competency of testimony offered in an inferior court to show that a decision in this court was obtained by fraudulent devices, *when that decision is not relied on as evidence of any fact or pleaded as an estoppel, but merely because it may be referred to as settling a principle of law applicable to the case at bar.*
>
> There is in the record of that case, as it remains in this court, sufficient answer to this objection to the opinion *as an authority on the law in this case.* The writer of this opinion, though then a member of the court, declined to take any part in its decision because he had been of counsel for the navigation company in a general way, and did not know how far he might have been engaged in that case. But when it was submitted on printed arguments on both sides he saw at once that the legal propositions involved did affect materially the title of several railroad companies in Iowa to the lands in question, and he felt it to be his duty to call the attention of those of his brethren who must decide the case to that fact. On this suggestion an order was made that those companies be notified of the pendency of that suit, with liberty to intervene and be heard on the question in which they were interested. They did intervene, the case was

> postponed for over a year, and several arguments were submitted in favor of the railroad companies by able counsel *on the very question now under consideration*, and an order was made inviting all parties interested to do so. It was after a full consideration of all these arguments that the decision was made. But there was an additional security that the court would carefully consider the question, in the fact that there was submitted at the same time the case of *Burr vs. the Des Moines Navigation & Railroad Company*, on a similar warranty of title. Now, though both suits were decided in the circuit court for the southern district of New York, they were decided by different judges, and the decisions were in conflict. This of itself would demand of the court a careful consideration of the point of difference which was the very point now under consideration. * * *
>
> Whatever, therefore, may have been the design of the original parties to the suit of *Wolcott vs. the Des Moines Company*, it is clear that the question here involved was argued fully by parties deeply interested on both sides, and received the attentive consideration of the court, and as an authoritative exposition of its views is entitled to the same weight as other well considered cases.

Further and conclusive evidence that the question for decision, and the land, the title to which was in controversy, was the same in the two cases will be found by a comparison of descriptions and a reference to the argument of Platt Smith on behalf of the Dubuque & Sioux City R. R. Co., intervenor, in the Wolcott case. The identity of the lands will be seen from the description of those involved in the homestead company case (27) embracing all of the *odd* numbered sections in townships 88 and 89 north, of range 27 and 28 west, and all of the lands involved in the Wolcott and Burr cases (101) being in *odd* numbered sections, in these *same* townships and ranges.

The Wolcott-Burr decision has repeatedly been reaffirmed, and the court in *Homestead Company vs. Valley Railroad*, 17 Wall., on page 162, thus refers to it:

> The main question involved in this case is the question of the title to the Des Moines river lands, which was *settled* several years ago by the decision in the cases of Wolcott and Burr, and in the subsequent unreported case of *Riley vs. Wells*, adversely to the titles set up by the appellants. At the present term of this court the principles involved in these decisions have been reconsidered and reaffirmed.

In *Litchfield vs. the County of Webster*, 101 U. S., it is said on page 777, referring to the conflicting claims under the railroad and river land grants, respectively, and to the fact of the lands having been claimed by the state under the former grant, it is said:

> This claim on the part of the state was maintained and constantly asserted adversely to Litchfield, until the case of *Wolcott vs. Des Moines Company*, 5 Wallace, 681, was decided in this court at the December term, 1866. *That decision settled the dispute as to these lands.*

Is the decision of the state court as to the proper interpretation and effect of the decision of this court, in *Homestead Company vs. Valley Railroad*, a "federal question" within the meaning of the act of congress.

It is respectfully submitted that upon this point the case is within the principle of the following decisions of this court: *Dupasseur vs. Rochereau*, 21 Wall., 130, in which on error to the supreme court of Louisiana, this court took and exercised jurisdiction to determine whether or not, upon a question of the order of priority of liens, the decree of the state court foreclosing a mortgage, accorded due force and effect to a decree previously rendered in the United States circuit court for that state, foreclosing another mortgage on the same premises; and *Embry vs. Palmer*, 107 U. S., 3, in which it was held that this court might, on error, review the judgment of the supreme court of Connecticut enjoining the collection of a judgment rendered by the supreme court of the District of Columbia.

The decree of the federal court—which it was claimed in the first named case had not been given its due legal effect—it will be observed, was rendered in a case to which Rochereau, against whom the question was made, was not a party. Yet this court took jurisdiction and affirmed the decision of the state court *because it had given due effect to the decision of the federal court.* The state court could not have certified more certainly than it has in the case at bar that its decision was against the immunity claimed *because of the limited effect allowed* *by it to the Wolcott decision.* Suppose the defense of the statute of limitations, the case in all other respects being the same, had, instead of turning upon a decision of this court, turned upon the meaning and effect to be given to an act of congress, would the question in legal effect have been different? And yet is it not clear that it would have been a federal question.

Crescent Live Stock Co. vs. Butchers' Union, 120 U. S., 143, holds as follows:

> The judgments and decrees of the circuit court of the United States sitting in a particular state are to be accorded in the courts of that state, whether as the foundation of an action or of a defense, either by plea, or in proof such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority; and whether such due effect has been given by such court to a judgment or decree of a court of the United States, is a federal question within the jurisdiction of this court on a writ of error to the supreme court of the state.

In the opinion on page 146, it is said;

> It is argued by counsel for the defendant in error that this does not embrace any federal question that the effect to be given to a judgment or a decree of the supreme court of the United States sitting in Louisiana by the courts of that state is to be determined by the law of Louisiana or by some principle of general law as to which the decision of the state court is final, and that the ruling in question did not deprive the plaintiff in error of any privilege or immunity specially set up or claimed under the constitution or laws of the United States. But this is an error. The question whether a state court has given due effect to a judgment or decree of a court of the United States, is a question arising under the constitution and laws of the United States, and comes within the jurisdiction of the federal courts by proper process.

In *Factors & Traders Insurance Company vs. Murphy*, 111 U. S., 738, it was held, that this court had jurisdiction because the controversy in the case related to the effect to be given to a sale under an order of the district court of the United States.

While in terms the certificate states the question to have been whether or not the decision in the Wolcott case was a *final* decision of the question of title, it is obvious that it could only have been, whether or not, upon the theory of that court, as to the nature of the implied promise and the condition upon which a suit could be brought, it was such a decision of the question as gave to the defendant in error an immediate right of action upon it.

The decision was necessarily final, unless and until in some manner reviewed and set aside by this court, of which having been done there is no pretense. The supreme court of Iowa must therefore necessarily have held that the question of title was not one of the questions decided in the Wolcott and Burr cases, as otherwise it must necessarily have held a cause of action to have then accrued and to have been barred long before the commencement of this suit. The question therefore in reality was, whether or not the question of title was decided, and not as to its being or not being final. How long must the defendant in error have waited to find out whether or not the decision was final and gave it a right of action? Was it to wait until the commencement of another action, and if such action had never been commenced would the decision have never become final?

II.

Was the question whether or not defendant in error was estopped by the judgment of the court in the case of the *Homestead Company vs. Valley Railroad*, a federal question, and, if so, was it erroneously decided?

That the defense of former adjudication by this court as shown by the record, presents a federal question is not controverted, but it is claimed that it was waived by failure of plaintiff in error, to insist upon it in his printed argument filed in the state court; and the *opinion* of that court is relied upon as the evidence to this court of such waiver. Assuming for the present, that this court will accept the statement of the opinion that the state court, for the reason therein also stated, *could not* determine the question of prior adjudication, as proper and sufficient evidence that it *did not* determine it, in the sense of not having in fact considered and passed upon it, the question still remains, whether or not *its determination was necessary to a decree such as was rendered.*

If the claim of immunity under the prior adjudication was properly made and presented to the court for decision, and the question was of such controlling character that its correct decision was necessary to any final judgment in the case, then, notwithstanding the court may not, in fact, have *considered* it, the decree for the defendant was in legal effect a decision against the immunity claimed. Section 709, Revised Statutes, was intended to secure to every litigant whose right should depend on any question of federal law, the right to have such question decided by this, the highest federal tribunal, wherever such right should be denied him in the state courts. The jurisdictional fact is not, that in the *opinion* of the state court, the claim of right or immunity is not well founded, but the fact of failure of the party claiming it to secure the same by the judgment or decree of that court. In other words, whenever the federal question is such and so presented that its decision is necessary to a final judgment in the case, unless the judgment of the state court is in favor of the party claiming the right or immunity, *simply because it is not*, the case is brought within the unquestionable jurisdiction of this court for determination on writ of error. If this were not so it would always be in the power of the state court by simply *ignoring* a federal question, to make its judgment final and conclusive against the right or immunity claimed, *when it could not do so by an expressly adverse decision.*

In *Murdock vs. City of Memphis*, 20 Wall., 590, this court, stating the conclusions of an elaborate opinion on this and other questions growing out of the same statute, on pages 635-6, lays down the following, among other, propositions:

1. That it is essential to the jurisdiction of this court over the judgment of a state court that it shall appear that one of the questions

mentioned in this act must have been raised and presented to the state court.

2. That it must have been decided by the state court or that its decision was necessary to the judgment and decree rendered in the case. *

* * *

7. But if it be found that the issue raised by the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the state court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the federal question, then this court will reverse the judgment of the state court, and will either render such judgment here as the state court should have rendered or remand the case to that court as the cricumstances of the case may require.

And, in the same opinion, on page 632, it is said:

> It was, no doubt, the purpose of congress to secure to every litigant whose rights depended on any question of federal law, that that question should be decided for him by the highest federal tribunal, if he desired it, when the decisions of the state courts were against him on that question. That rights of this character guaranteed to him by the constitution and laws of the union should not be left to the exclusive and final control of the state courts.

It surely cannot be that such rights cannot be defeated by the *action* and yet may be by the *inaction* of state courts.

In *Chouteau vs. Gibson*, 111 U. S., 200, it is said:

> From the beginning it has been held that to give us jurisdiction in this class of cases it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the state for decision, but that it was decided, *or that its decision was necessary to the judgment or decree rendered in the case.*

It will not be controverted that the decision of the question made in this case by the defense of former adjudication, *if presented for decision*, was necessary to the decree rendered by the supreme court of Iowa.

The record shows that the defense of former adjudication was plead (5), and that it was proved (17-38).

Among the errors assigned by plaintiff in error (108), in its assignment of errors complained of as having been committed by the lower court, is the following:

3. The court erred in holding that plaintiff was not estopped from prosecuting this suit by the former adjudication in the said former suit of the *Iowa Homestead Company vs. The Des Moines Navigation and Railroad Company* and others.

The Code of Iowa, section 3207, provides with respect to the assignment of errors as follows:

> An assignment of error need follow no stated form but must, in a way as specific as the case will allow, point out the very error objected to. Among several points in a demurrer, or in a motion, or instructions, or ruling in an exception, it must designate which is relied on as an error, and the court will only regard errors which are assigned, with the required exactness; *but the court must decide on each error assigned.*

In *Baker vs. Kerr*, 13 Iowa, 384, construing this section and holding that literal compliance therewith is not necessary, the following extract from *Willets vs. Ridgway*, 9 Ind., 367, construing a similar provision in the constitution of that state is quoted with approbation.

> These and other considerations have led the court to inquire, when does a question, in the sense of the constitution, arise in the record? * * * It must be a question the decision of which is necessary to the final determination of the cause, and which the record presents with a fullness and distinctness rendering it possible for the court to comprehend it in all its bearings.

Following which the Iowa court adds:

> With the spirit of these views, *as well as the provisions of our statute*, we shall, as heretofore, endeavor to comply.

Nothing can be clearer than that the question of prior adjudication was, by every proper step and method, raised and presented to the supreme court of Iowa for decision.

Having been so raised and presented was it subsequently waived? The burden is upon defendant in error to show that it was. Has he shown it?

Had the supreme court of Iowa reason to believe, and did it believe, that the defense of former adjudication was in fact abandoned?

In the opinion, referring to this and another case which by permission and for the convenience of the court was submitted with it, it is said:

> The question of former adjudication, discussed in the fifth point of the foregoing opinion, is not discussed by counsel for defendant in this case in his printed brief, though it was pleaded as a defense. Counsel for plaintiff in this case filed a printed brief used in the former case, but upon the fifth point it is not at all applicable, for the reason that the facts involved in the pleas of former adjudication are not identical in each case. The two cases were discussed at the oral argument together, all the points involved in each case being considered, but we were left to the printed briefs and abstracts in order to make application of the arguments properly to the separate cases. Since the submission of the cases, counsel for each party has been called upon to express his understanding of the points to be determined in the cases separately. Counsel for defendant claims that the question of prior adjudication, while not presented in his printed brief, was argued orally, and is therefore in this case; counsel for plaintiff claims that it is not. Certain it is that it is not made in the printed brief for defendant, and we are unable to say that it was made on the oral argument *as applicable to this case.* The counsel for defendant having failed to present this point in his brief, he cannot, according to the spirit of our rules, urge it on oral argument. *In view of the want of agreement between counsel*, we are required to hold that the question of prior adjudication cannot be determined in this case.

It will be noticed that it is distinctly stated that "the two cases were discussed together at the oral argument, *all the points involved in each case being considered.*" That the point in question could not have been discussed and considered in the other case is evident, as, according to the further statement of the opinion, it would not have been applicable to that case, owing to the dissimilarity of the "facts involved in the pleas of former adjudication" in the two cases. Yet the court, overlooking this difference in the issues, as a means of applying the oral argument, after the submission, called upon counsel for each party to express his understanding of the "points to be determined in the cases." In response, it is said, "counsel for defendant claims that the question of prior adjudication, while not presented in his printed brief, was argued orally, and is therefore in this case; counsel for plaintiff claims that it is not." Whereupon, after stating that according to the *spirit* of its rules, a point not presented in the printed brief cannot be argued orally, the court concludes "in view of the want of agreement between counsel" that "the question of prior adjudication cannot be determined."

It seems not to have been denied by counsel for defendant in error that the question was argued orally, the language of the court clearly importing that he only claimed, that, for some reason not stated by the court, it was not in the case. It *was in the case*, as has already been shown, and the inquiry, by the court of counsel, could only have been with a view to determine whether or not it had been waived or abandoned by plaintiff in error. Why refer the matter to counsel for *agreement*, if the failure to make the question in the *printed brief* was of itself a waiver or abandonment? Unless, in case it were found to have been argued orally, that fact was to be taken as showing that it was not waived, why was the inquiry made? And having been made, and counsel for plaintiff in error claiming that it was so argued, and opposing counsel not having denied that it was, why should not the court have assumed that it was and held accordingly?

But will this court permit its jurisdiction to depend upon any such contingency as the failure of counsel in the state court, after submission in that court, to *agree* as to the "points to be determined in the case?"

The court does not say either that the question was waived or that it was not argued orally, and does in effect say that it was not waived by failure to present it in the printed brief, and that the only reason why it could not be determined was "the want of agreement between counsel" as to what were "the points to be determined" in the case.

Upon the record, excluding the opinion, there can be no doubt but this court would be required to find and hold that the question of prior adjudication was properly raised and presented for decision, *and the opinion does not say that it was not.*

It cannot be denied that the question of the right of the plaintiff in error to the immunity claimed was, in fact, raised and presented for decision. The judgment under which it was claimed is still the judgment, unreversed and in full force, of this court, and the question is whether it is still a protection to the party in whose favor it was rendered. With all due respect to the supreme court of Iowa, it is submitted that its decision, in fact if not in intent, was a mere evasion of the question of former adjudication, and left that question, the decision of which was clearly necessary to the judgment rendered, as if it had not in fact been in any manner passed upon.

That this court would in such a case have jurisdiction is a proposition, sound in principle, and well sustained by authority, It was clearly the purpose of the act of congress to secure to a litigant, whose rights depend on questions of federal law, the right to have all such questions decided by this, the highest federal tribunal, whenever, on proper presentation, he has been unable to get a favorable decision in the state tribunal. This right is no less valuable because of being simply *ignored* or *evaded*. In the case of an adverse judgment, it can make no difference to a party deprived of a right by what means he is deprived of it.

In the opinion in *Crowell vs. Randall*, 10 Pet., 368, in which it is perhaps more explicitly stated than in any other case that an actual decision of the federal question is necessary to give this court jurisdiction, the previous cases, in which the question had arisen, were carefully reviewed; and they not only do not sustain the position that there must be an actual decision, in the sense of expressly, or in terms, passing on the question, but do sustain the contrary position, that it is sufficient to give jurisdiction, if a federal question, essential to the decision of the case, is properly before the court for decision. In *Miller vs. Nicholls*, 4 Wheaton, 311, referred to in that opinion on page 393, jurisdiction was denied for the reason that the insolvency of Nicholls, upon which the federal question depended, did not appear. The court in its review of the case say:

> But it did not appear in the statement of facts that Nicholls was then in a state of insolvency, and if he was not, then the priority of the United States did not attach or, in other words, the act of congress was not applicable to it. It is to this state of the facts that the language of the chief justice—Marshall—was addressed. He—the chief justice—added: ‘had the fact of insolvency appeared upon the record that would have enabled this court to revise the judgment of the supreme court of Pennsylvania. And why, it may be asked. Because upon the statement of facts the state court must, under these circumstances, have misconstrued the act of congress *or disregarded* it; for otherwise they would not have given the judgment which was sought to be revised.’

Following this are quotations from the opinions in other cases as follows:

From the opinion in *Hickie vs. Starke*, 1 Pet., 98, quoted on page 395:

> But it has always been deemed essential to the exercise of jurisdiction in such a case that the record should show a complete title under the treaty or act of congress and that *the judgment* of the court is *in violation* of that treaty.

From *Wilson vs. Blackbird Creek Marsh Company*, 2 Pet., 245, quoted also on page 395—

> It is sufficient to bring the case within the provision of the twenty-fifth section of the judiciary act, if the record shows that the constitution or a law or a treaty of the United States must have been misconstrued or the decision could not have been made, or, as in this case, that the constitutionality of a state law was questioned and the decision was in favor of the party claiming under such law.

From *Craig vs. State of Missouri*, 4 Pet., 410, quoted on page 396:

> It is sufficient if the record shows, that the constitution, or a treaty or law of the United States *must have been construed* or that the constitutionality of the state law *must have been questioned*, and the decision has been in favor of the party claiming under such law.

On page 395, the following reference in *Williams vs. Norris*, 12 Wheaton, 117, to *Miller vs. Nicholls*, is quoted:

> Had the record shown that this was a case of insolvency so that the act of congress applied to it, that act *must have been* misconstrued, or its obligation denied, when the court decreed the money to Pennsylvania, and the court were of opinion that the act *could not be evaded* by the omission to refer to it in the judgment or to spread it on the record.

In *Williams vs. Bruffy*, 102 U. S., 248, the Virginia court of appeals having denied a supersedeas for the review of a judgment of an inferior court of that state, the judgment sought to be reversed involving a federal question, this court, on error to the court of appeals, maintained the rightfulness of its jurisdiction, and on page 253 used this language :

> No doctrine of this court rests upon more solid foundations, or is more fully valued or cherished, than that which sustains its appellate power over state courts where the constitution, laws and treaties of the United States are drawn in question, and their authority is denied *or evaded.*

In *Chicago Life Insurance Co. vs. Needles*, 113 U. S. 574, it was held that—

> When the final judgment of a state court involves the adjudication of the claim made therein that a statute of the state is in derogation of rights secured to a party by the constitution, this court has jurisdiction of the cause in error although the state court did not in terms pass upon the point,

And on page 579 in the opinion it is said :

> The supreme court of Illinois did not in terms pass upon the claim distinctly made there as in the court of original jurisdiction that the statutes in question were in derogation of rights and privileges secured to appellant by the constitution of the United States. But the final judgment necessarily involved an adjudication of that claim, for if the statutes upon the authority of which alone the Auditor of State proceeded are repugnant to the national constitution that judgment could not have properly been rendered. This court therefor has jurisdiction to inquire whether any right or privilege protected by the constitution of the United States has been witheld or denied by the judgment below.

In *Brown vs. Colorado*, 106 U. S., 97, it was said :

> **Certainly if the judgments of the courts of the states are to be reviewed here on such (federal) questions, it should only be when it appears unmistakably that the court *either knew or ought to have known* that such a question *was involved in the decision to be made.***

In *McManus vs. O'Sullivan et al.*, 91 U. S., 578, it is held as follows :

> **This court has no jurisdiction to re-examine the judgment of a state**

court where a federal question was not in fact passed upon, *and where a decision of it was rendered unnecessary in the view which the court below took of the case.*

In *Murdock vs. City of Memphis*, 20 Wallace, 590 it is said in the opinion, page 636:

> But if it be found that the issue raised by the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the state court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the federal question; then this court will reverse the judgment of the state court.

In the following, and many other cases, it has been held that to sustain the jurisdiction, it must appear that the federal question was actually decided, "*or that its decision was necessary to the judgment or decree in the case.*"

Chauteau vs. Gibson, 111 U. S., 200.
Murdock vs. City of Memphis, 20 Wall., 636.
Detroit Railway Co. vs. Gothard, 114 U. S., 133.

But this court has jurisdiction to hear and pass upon the very question on account of which the supreme court of Iowa said it could not pass upon the question of former adjudication. This jurisdiction results from the fact that the question of prior adjudication and the immunity claimed by plaintiff in error thereunder, was by that court, made to depend directly and absolutely upon the alleged waiver thereof by failure to properly present it for decision. It is only when a case can be disposed of by the state court on a question not related to and affecting the federal question, that the latter need not be passed upon.

In *Mackay vs. Dillon*, 4 Howard, 421, it is said that when it is sought to give effect to evidence, "for purposes which involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed in a similar manner as if a like question had arisen in a supreme court of error of a state when reviewing the proceedings of inferior courts of original jurisdiction."

And in *Kennedy's Executors vs. Hunt's Lessee*, 7 Howard, 586, involving a congressional grant, and the question being as to whether or not a ruling of the state court rejecting evidence of a certain survey of the grant raised a federal question, the court, on page 594, held that it did not, but for the reason that "it could not change the grant nor affect its validity in any degree."

The same rule must apply for the same reason whenever, in any similar case, it is sought to give effect to any fact or question "for purposes which involve questions giving this court jurisdiction."

It will be seen by reference to the copy of the record of the change of the certificate copied into the statement, page 5, that plaintiff's motion for change was alleged to be "because the question whether the former adjudication set up in the defendant's answer as a bar to plaintiff's action was not *in fact* passed upon or decided by the court." While the original certificate recites that immunity under the prior adjudication was claimed, by "the answer of defendant, in defendant's assignment of errors, *and on the hearing in said cause*," the motion complains only of the recital that the "decision herein was and is against the immunity claimed by defendant," and, therefore, inferentially admits that all of the other statements, including the one that the immunity was claimed on the hearing, are true.

The change in the certificate was made July 22, 1884; the writ of error and bond, having been previously allowed and approved, were filed on the 15th of the same month, and the citation was served on the next day, the 16th. The change was, therefore, after the removal, and consequently after the jurisdiction of the state court to take any further proceedings in the case was suspended. This was not a merely formal amendment of the record to conform to the admitted facts, but if anything more was intended by the change than to exclude the idea that the question was *in fact* considered and passed upon by the court, it was a further proceeding in the case with respect to a controverted matter.

It is conceded to be the settled practice of the supreme court of Iowa to consider only such errors as are presented in argument. But this is upon the presumption that what is not argued is waived. Such a practice can of course have no application to a case in which errors are assigned and argued orally, or to a case in which, though not argued, the court is by *any means* advised that they are not waived, but are, on the contrary, insisted upon.

C. H. GATCH AND
WILLIAM CONNOR,
Attorneys for Plaintiff in Error.

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See Arg in 43 pages
9 to 11

IN SUPREME COURT OF THE UNITED STATES.

THE DES MOINES NAVIGATION & RAILROAD COMPANY *Plaintiff in Error.*

vs.

THE IOWA HOMESTEAD COMPANY
Defendant in Error.

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

Motion to Quash Writ of Error

C. H. GATCH, for Plaintiff in Error.
GEO. CRANE, for Defendant in Error

DEFENDANT'S BRIEF.

IN SUPREME COURT OF THE UNITED STATES.

THE DES MOINES NAVIGATION & RAILROAD COMPANY *Plaintiff in Error.*

VS.

THE IOWA HOMESTEAD COMPANY

Defendant in Error.

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

C. H. GATCH, for Plaintiff in Error.

GEO. CRANE, for Defendant in Error

Motion to Quash Writ of Error

Argument of Defendant in Error in Support of Motion.

I.

In 1868 the Iowa Homestead company brought suit against the Des Moines Navigation & Railroad company and its grantees to establish title to certain lands situated in Webster county, Iowa, and known as the "Des Moines River lands," and also asked in case the title should be found to belong to the Des Moines Navigation & Railroad company, that the plaintiff have judgment for the amount of taxes paid by it on the lands during the controversy about the title. This suit was started in the District Court of the state of Iowa, was transferred to the

Circuit Court of the United States and afterwards brought to this court by appeal. This court dismissed the bill of complaint and delivered an opinion holding that the plaintiff could not recover the taxes paid by it on the lands in controversy. In the case now before this court, the petition asks judgment for the taxes paid by plaintiff during said controversy about title and the answer sets up the decision in the former suit as a bar to plaintiff's right to recover; but in point of fact the question of former adjudication was neither presented to nor passed upon by the Supreme Court of the state of Iowa. The plaintiff in error insists that claiming immunity under a judgment of a *federal* court raises a federal question and gives this court jurisdiction of the case. The record discloses the fact that the chief justice of the Supreme Court of Iowa signed an incorrect certificate at the instance of appellant's counsel, to the effect that the Supreme Court of Iowa had passed upon the question of former adjudication. The court afterwards corrected the certificate by striking out the incorrect portion.

ARGUMENT.

II.

Unless this court can be induced to act upon a false record there is not even a pretext for bringing this case here for consideration. The opinion of the state court shows conclusively that the question whether the judgment in the Homestead suit constituted a bar to appellee's claim in this suit, was not considered or passed upon by the Supreme Court of Iowa. The decision of this question is all that the appellant relies upon to give this court jurisdiction.

That this court will examine the opinion of the state court to ascertain what was decided by that court has become an established rule, since the passage of the act of July 5th, 1867. In Murdock vs. Memphis 20 Wall. 633, the rule stated is in the following language:

> "The omitted clause of the act of 1789, declared that no other error should be regarded as ground of reversal, than such as appears on the face of the record and immediately respects the before mentioned question.
>
> It is probable that in determining whether one of those questions was actually raised and decided in the state court, this court has been inclined to restrict its inquiries too much by this express limitation of the inquiry

'to the face of the record.' What was the record of a case was pretty well understood as a common law phrase at the time the statute was enacted. But the statutes of the state and the new modes of proceedings in those courts have changed and confused the matter very much since that time. It is in reference to one of the necessities thus brought about that this court long since determined to consider as part of the record the opinions in such cases by the supreme court of Lousiana. And though we have repeatedly decided that the opinions of other state courts cannot be looked into to ascertain what was decided, we see no reason why, since this restriction is removed, we should not so far examine those opinions when properly authenticated, as may be useful in determining that question."

"We have been in the habit of receiving the certificate of the court signed by its chief justice or presiding officer on that point, though not as conclusive, and these opinions are quite as satisfactory and may more properly be treated as part of the record than such certificates."

Murdock vs. Memphis, 20 Wall 633.
McManus vs. Sullivan, 91 U. S. 578.

In its opinion the Supreme Court of Iowa uses this language;

"Counsel for defendant claims that the question of prior adjudication while not presented in his printed brief, was argued orally and is therefore in this case; counsel for plaintiff claims that it is not. Certain it is that it is not made in the printed brief for defendant, and we are unable to say that it was made on the oral argument as applicable to this case. The counsel for defendant having failed to present this point in his brief, he cannot, according to the spirit of our rules, urge it in oral argument. In view of the want of agreement between counsel we are reqnired to hold that *the question of prior adjudication cannot be determined in this case.*"

It is a settled rule of practice with the Supreme Conrt of Iowa "that errors assigned which are not discussed or insisted upon in argument will not be considered, "*Only those errors* presented in argument will be considered."

Shaw vs. Brown 13 Iowa, 508.
Cook vs. R. R. Co. 37 Iowa 426.
Bremer County Bank vs. Bremer Co. 42 Iowa 394.

III.

Again, in order to give this court jurisdiction, "It must appear *affirmatively* on the face of the record, not only that a federal question was raised and presented to the highest court of the state for decision; but that *it was decided*, or that its decision was necessary to the judgment or decree rendered in the case."

Murdock vs. Memphis 20 Wall, 633.

Choutean vs. Gibson 111 U. S. 200.

There is not a shadow of evidence on the face of the record to show that the Supreme Court of Iowa *decided or passed upon* the question of former adjudications. This point was made in the pleadings and assigned as an error; but not being argued it was not decided by the court. Indeed the record furnished affirmative evidence that this question was not considered by the court.

The original certificate signed by the chief justice, stated that immunity was claimed on account of such former adjudication and that the decision of the court was against such immunity. On the motion of the appellee, the court ordered this statement to be stricken out as untrue. It is clear, therefore, that the record does not show *affirmatively*, that the question of former adjudication was *actually decided* by the state court. The writ of error must therefore be dismissed.

IV.

The record in this case shows how unsafe it is for this court to rely upon the certificates of the state courts instead of their opinions. In this case the certificate signed by the chief justice contained the false statement that the question of former adjudication was decided by the court. On motion the court corrected the certificate by striking out the above erroneous statement, the opinion itself showing distinctly the contrary.

The rest of the certificate has no reference to any issue in this case. It is evidently copied by the clerk from the certificate in another case. It speaks of a defense based upon the statutes of limitation of New York, while in point of fact both parties to the suit were corporations of Iowa and could not by any possibility, be affected by such statute. Indeed that statute was never before mentioned in the case.

GEORGE CRANE

Attorney for Appellee.

See Arg in 43
pages 9 to 11

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 45.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE IOWA HOMESTEAD COMPANY,
DEFENDANT IN ERROR.

ON ERROR FROM THE SUPREME COURT OF IOWA.

BRIEF IN REPLY.

C. H. GATCH AND WM. CONNOR, FOR PLAINTIFF IN ERROR.
GEO. CRANE, FOR DEFENDANT IN ERROR.

P. C. Kenyon, Publisher Law Briefs, Des Moines.

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GEORGE CRANE

Attorney for Appellee.

See Arg in 43
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ON ERROR FROM THE SUPREME COURT OF IOWA.

Brief in Reply.

C. H. GATCH and WM. CONNOR, for Plaintiff in Error.
GEO. CRANE, for Defendant in Error.

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Defendant in Error.

No. 45.

On Error from the Supreme Court of Iowa.

C. H. Gatch and William Connor, *for Plaintiff in Error.*
Geo. Crane, *for Defendant in Error.*

BRIEF IN REPLY.

I.

In answer to that part of our opening argument in which it is claimed that defendant in error is estopped by the adjudication in the case of *Homestead Company vs. Valley Railroad*, 17 Wall., 173, it is objected that that adjudication was void, for want of jurisdiction, the alleged want of jurisdiction consisting of the fact that all of the defendants in the former suit were not citizens of a different state from that of which the plaintiff was a citizen.

After the cause was removed to the United States circuit court, the plaintiff Homestead company, October, 23, 1870, "by leave of court and consent of counsel," amended its petition (Fol. 27). Previously to this, but after the removal (31–32), it stipulated that the answers of certain named defendants, including its own, should "be deemed and taken as the answer of the several defendants herein." When the cause came on for hearing in the circuit court, it stipulated as to what questions it should be heard upon, and that it should not be heard upon any other (32), and the decree of the court recited that on the hearing it appeared by Elwood, Nourse and Withrow.

After the hearing and decree in that court, a written stipulation was filed, in which it joined with the other defendants, by which it was, among other things, stipulated as follows:

> And it is further stipulated that the defendants, Samuel G. Wolcott, Edwin C. Litchfield, William J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade and John Stryker, each and all of whom are citizens of New York, and the Des Moines Navigation and Railroad Company, duly appeared in this court and filed their joint and several answers to complainant's bill, duly verified. * * * And it is furthur stipulated and agreed that the answer of defendant William B. Welles, verified by him, with the necessary changes and variations, to show and present the proper and respective interest of defendants Samuel G. Wolcott, Edwin C. Litchfield, Edward Wade and John Stryker, *and* the Des Moines Navigation and Railroad Company, shall be taken, treated and deemed the answer of said last mentioned defendants herein (35).

And, finally, after the case came into this court, it again stipulated that the evidence in the court below established certain facts therein recited (36).

It would certainly be most remarkable if, upon such a record, after final decree in this court, the validity of the decree could be collaterally assailed and treated as a nullity. Without going into an elaborate discussion of the question, we are content to submit it upon the following authorities.

In *Skillern's Ex'rs vs. May's Ex'rs*, 6 Cranch., 267, it was held "too late to question the jurisdiction of the circuit court after the cause has been sent back by mandate."

The case came to this court upon the following certificate of division:

> In this case a final decree had been pronounced, and by writ of error removed to the supreme court, who reversed the decree, and after the

> cause was sent back to this court it was discovered to be a case not within the jurisdiction of the court; but the question arose, whether it can now be dismissed for want of jurisdiction after the supreme court has acted thereon. The opinion of the judges of this court being opposed on this question, it is ordered "that the same be adjourned to the supreme court for their decision."

The court determined the question as follows:

> It appearing that the merits of this cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the circuit court is bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings.

In *McCormic vs. Sullivant*, 10 Wheat., 192, it was held:

> The courts of the United States are courts of *limited* but not *inferior* jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees may be reversed for that cause on a writ of error and appeal, but until reversed they are conclusive evidence between parties and privies.

Defendants relied upon the former decree of one of the Federal courts in a suit where the record failed to show the citizenship of the parties to be such as was requisite to confer jurisdiction. It was claimed that by reason of this defect the suit was *coram non judice*, and the decree therefore void; but the court, on page 199, said:

> But this reason proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not on that account inferior courts in the technical sense of those words, whose judgments taken alone are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may upon a writ of error, or appeal, be reversed for that cause. *But they are not absolute nullities.*

And on same page, referring to the case of *Skillern's Execrs. vs. May's Execrs.*, used the following language:

> That suit came before this court upon a writ of error, where the decree of the court below was reversed and the cause remanded for further proceedings to be had therein. After this it was discovered by that court that the jurisdiction was not stated in the proceedings, and the question was made, whether that court could dismiss the suit for that

reason? This point, on which the judges were divided, was certified to the supreme court, where it was decided that the merits of the cause having been finally decided in this court and its mandate only requiring execution of its decree, the court below, was bound, to carry that decree into execution *notwithstanding* the jurisdiction of that court was not alleged in the pleadings. Now, it is very clear that, if the decree had been considered a nullity, on the ground that jurisdiction was not stated in the proceedings, this court could not have required it to be executed by the inferior court.

In *Kennedy et al. vs. Georgia State Bank et al.*, 8 How., 586, it was held that—

> If the jurisdiction of a circuit court be not shown in the proceedings in the case, its judgment is erroneous and liable to be reversed, but is not an absolute nullity.

In this court the record was, by consent, so amended as to show jurisdiction. The court, on page 611, uses this language:

> But if no amendment had been made, would the orders and decrees in the case by the circuit court have been nullities? That they would have been erroneous and liable to be reversed is admitted. In *Skillern's Ex'rs vs. May's Ex'rs*, 6 Cranch., 267, a final decree had been pronounced, and by writ of error removed to the supreme court, who reversed the decree, and after the cause was sent back to the circuit court, it was discovered to be a *cause not within the jurisdiction of the court;* but a question arose whether in that court it could be dismissed for want of jurisdiction *after the supreme court had acted thereon.* The opinion of the judges being opposed on that question, it was certified to the supreme court for their decision, and this court held "that the circuit court was bound to carry the decree into execution, although the jurisdiction of that court be not alleged in the pleadings."

In *Washington Bridge vs. Stewart*, 3 Howard, 413, it was held:

> After a case has been decided upon its merits and remanded to the court below, if it is again brought up on a second appeal it is then too late to allege that the court had not jurisdiction to try the first appeal.

The court say, on page 424: "The want of jurisdiction is a a matter of abatement;" and further, on same page, referring to the case of *Skillerns' Executors vs. Mays' Executors*, 6 Cranch., *supra:*

> The jurisdiction of this court in that case was as defective as it is said to have been in this, when that cause was before this court, though the

judgment of the court below on it would have been reversed upon motion for the want of jurisdiction, *on the face of the record*, the defect having escaped the notice of the court and of counsel, and the court having acted upon its merits, it determined that its decree should be executed. The reason for its judgment, no doubt, was that the motion to dismiss the case in the court below for the want of jurisdiction, after it had been before the supreme court by writ of error and had been acted upon, would have been equivalent had it been allowed to a decision that the judgment of this court might be reviewed when law points out no mode in which that can be done either by this or any other court.

In *DeSobry vs. Nicholson*, 3 Wallace, 420, it was held:

> A motion to dismiss a case from want of proper citizenship in the parties cannot be made at the trial and after pleading a general issue and special defenses.

The court say, on page 423:

> The objection to jurisdiction upon the ground of citizenship, in actions at law, can only be made by a plea in abatement. After the general issue it is too late. It cannot be raised at the trial upon the merits. If a plea in abatement be filed with the general issue the latter waives the former. Where a plea in abatement is relied upon the burden of proof rests upon the defendant. In equity the defense must be presented by plea or demurrer and not by answer. The court below properly overruled the motion.

II.

Upon the question as to when and how far this court will consider and determine questions of state or common law, "for purposes which involve questions giving it jurisdiction," we here refer to the following additional authorities:

Martin vs. Hunter, 1 Wheat, 304, was an action of ejectment in which the plaintiff claimed title under a patent from the state of Virginia and the defendant as devisee of Lord Fairfax by a title which it was claimed by plaintiff was invalid; first, because Lord Fairfax, at the time of his death, had not acquired the absolute property in the land by actual seizin and possession; and, second, because the devisee was an alien at the time of the testator's death and could therefore not take the land by devise.

The validity of the plaintiff's patent depended upon whether or not the title of Lord Fairfax had, for either of the reasons stated, escheated to the state. If it had, it was prior to the definitive treaty of peace between the United States and England of September 3, 1783, by the sixth article of which it was provided that there should "be no future confiscation made nor prosecutions commenced against any person or persons for or by reason of the part which he or they may have taken in the war." The defendant claimed that his title had not been in any manner confiscated prior to the treaty, and that it was therefore protected by it, under this provision of the sixth article. The decision of the lower court in favor of the defendant was reversed by the court of appeals, and judgment rendered for the plaintiff. On error to this court, in argument on behalf of defendant in error, it was said, page 317:

> It does not appear upon the face of the record that the judgment was upon the treaty. It was not upon the treaty. The court of appeals, in their judgment, have expressly declared that it was not upon the treaty, by affirming that part of the judgment of the district court at Winchester which determined in favor of the treaty.

And again on the same page:

> The determination of the court was not limited, in any degree, to the construction of the treaty, which was only one of the numerous facts stated on which the title of the parties depended. How can this court ascertain on which of these facts the state court determined, or that it determined upon the treaty? The alienage of Lord Fairfax's devisee, and the question whether the lands did not escheat, without office found, might have been the point of decision, avoiding to consider the construction or validity of the treaty, which applies only to things confiscable.

Referring to which the court on pages 357, *et seq.*, say:

> The objection urged at the bar is, that this court cannot inquire into the title, but simply into the correctness of the construction put upon the treaty by the court of appeals, and that their judgment is not re-examinable here, unless it appear on the face of the record that some construction was put upon the treaty. If, therefore, that court might have decided the case upon the invalidity of the title (and *non constat*, that they did not), independent of the treaty, there is an end of the appellate jurisdiction of this court. * * * If this be the true con-

struction of the section it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction, and there are the strongest reasons against it, founded upon the words as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty and the decision is against the title set up by the party. It is therefore a decision *against the title set up with reference to the treaty*, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case there must be a *preliminary inquiry* into the existence and structure of the title before the court can construe the treaty in reference to that title.

If the court below should decide that the title was bad, and therefore not protected by the treaty, must not this court have a power to decide the title to be good, and therefore protected by the treaty? * * * One of the questions is, as to the construction of a treaty, upon a title specially set up by a party, and every error that immediately respects that question must, of course, be within the cognizance of the court. The title set up in this case is apparrent upon the face of the record, and immediately respects the decision of that question; and error, therefore, *in respect to that title*, must be reexaminable, or the case could never be presented to the court. * * * But the point has been already decided by the court upon solemn argument. In *Smith vs. State of Maryland*, (6, Cranch, 286), precisely the same objection was taken by counsel, and overruled by the unanimous opinion of the court. This case was in some respects, stronger than the present; for the court below decided expressly, that the party had no title, and therefore, the treaty could not operate upon it. This court entered into an examination of that question, and being of the same opinion, affirmed the judgment. There cannot, then, be an authority which could more completely govern the present question.

In the dissenting opinion of Johnson, J., page 369, it is said:

If there is any point in the case on which an opinion may be given with confidence it is this: whether we consider the letter of the statute or the spirit intent or meaning of the constitution and of the legislature, as expressed in the 27th section, it is equally clear, that the title is the primary object to which the attention of the court is called in every such case. The words are, "and the decision be against *the title*," so set up, not against the *construction of the treaty* contended for by the party setting up the title. And how could it be otherwise? The title may exist, notwithstanding the decision of the state courts to the con-

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ARGUMENT IN RESISTANCE OF MOTION TO QUASH WRIT OF ERROR.

IN THE

SUPREME COURT OF THE UNITED STATES.

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ON ERROR FROM THE SUPREME COURT OF IOWA.

C. H. GATCH, FOR PLAINTIFF IN ERROR.
GEO. CRANE, FOR DEFENDANT IN ERROR.

P. C. Kenyon, Publisher Law Briefs, Des Moines.

IN THE

Supreme Court of the United States.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE IOWA HOMESTEAD COMPANY,
Defendant in Error.

On Error from the Supreme Court of Iowa.

C. H. GATCH, *for Plaintiff in Error.*
GEO. CRANE, *for Defendant in Error.*

ARGUMENT IN RESISTANCE OF MOTION TO QUASH WRIT OF ERROR.

STATEMENT.

At the October term, 1868, of the district court of Webster county, Iowa, the Iowa Homestead Company, an Iowa corporation, commenced a suit against the Des Moines Navigation and Railroad Company, another Iowa corporation, and numerous grantees of the latter, to establish title in the plaintiff to the so-called "Des Moines river lands," and with a view to alternative relief, in the event of an adverse decree on the question of title, made the following allegation in its petition:

> The said plaintiffs have been in possession of the lands claimed by them, themselves or their grantors in contract, *since 1861*. They have

paid the taxes thereon to the State of Iowa *since*, in all amounting to eighty thousand dollars, and if their title has failed, they are entitled to have their taxes refunded *since 1861*, by the holder of the legal title who has not paid them. Record, p. 25.

And prayed—

That in the event of a decree that the plaintiff's present title or any part of it has failed, the said Des Moines Navigation & Railroad Company and its assigns may be decreed to repay the plaintiff all the taxes which he has paid on said land and interest thereon. Record, p. 26.

The answer to this part of the petition is as follows:

As to whether or not the said complainant and its vendees have been in possession of and paid said taxes on the lands claimed by them since 1861, to the amount of $80,000, this defendant is ignorant and uninformed save by the said complainants said bill of complaint, but expressly avers that the possession of the said lands by the said complainant and its vendees since 1861, is and has been unauthorized and wrongful.

The cause having been removed from the state court to the United States circuit court for the district of Iowa, on the hearing in the last named court the bill was dismissed with costs—record, page 35—and this decree was affirmed in this court. Record, p. 17.

On the question of complainant's right to the alternative relief claimed, this court say (*Homestead Company vs. Valley Railroad*, 17 Wall., p. 167):

It is true, in accordance with our decision, that the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well established rule as to voluntary payments. If the appellants, owing to their too great confidence in their title have risked too much, it is their misfortune; but they are not, on that account, entitled to have the taxes voluntarily refunded by the successful party in this suit.

As it is conceded by counsel for defendant in error in his brief, that this adjudication was plead in this case as a defense, it will not be necessary to set out the portion of the record showing that fact.

In the case of *Goodnow vs. Moulton*, 57 Ia., 555, prosecuted by Goodnow as assignee of the Homestead company for the recovery of part of these same taxes, the defense of voluntary payment having been relied upon, and the case of *Homestead Company vs. Valley Railroad*, having been cited as authority, the Supreme Court of Iowa, very strangely overlooking the above quoted paragraph of the opinion in that case say, in their opinion, page 560:

> We have looked in vain for anything in the statement of the questions involved or the opinion of the court, which tends to show, with any degree of certainty, that the right of the plaintiff to recover the taxes paid was in the case.

And more strangely still, in the subsequent case of *Goodnow vs. Stryker*, 14 N. W. Reporter, 345, now also pending here on a motion similar to this, after having discovered the oversight in the Moulton case, it is said:

> Since the decisions in *Goodnow vs. Moulton*, we cannot follow the decision in *Iowa Homestead Company vs. Des Moines Navigation & Railroad Company*.

The question of voluntary payment having been thus disposed of, it became necessary in the Stryker case to dispose of the further defense relied on, that the claim was barred by the New York statute of limitations, and this involved the real and decisive question, *when* and *how* did the cause of action accrue, which the opinion thus discusses and determines.

> We do not think a cause of action accrued upon each payment at the time it was made, nor upon all at the time the last one was made. The implied promise upon which the action is based, arose by reason of the circumstances. See *Goodnow vs. Moulton*, above cited. One very important circumstance was that the title was involved in serious litigation which was not terminated in the defendant's favor until 1873. We do not think the defendant's implied promise could be regarded as absolute. He certainly never promised to pay these taxes in case the title should be adjudicated to be in the Iowa Homestead Company and no one had

any reason to suppose he intended to incur any such liability. The most that can be said then in regard to the defendant's implied promise is, that it was based upon a contingency, and being so, it was not enforcible until the contingency had happened. We think that the cause of action did not arise until the termination of the litigation by which the title was adjudged to be in the defendant.

Plaintiff in error accepting this as settling the proposition that a cause of action accrued to the homestead company by "the termination of the litigation by which the title was adjudicated to be in the defendant," the Des Moines Navigation & Railroad Company, plead as one of its defenses in this case, the Iowa statute of limitations, relying on the decision of this court in the cases of *Wolcott vs. The Des Moines Company*, and *The Des Moines Company vs. Burr*, 5 Wall., 681 and 689, as being such termination of that litigation. For answer, setting up this defense—see record, page 5—and for the evidence showing the intervention of the homestead company in the two last named cases—see record, pp. 88–100.

The following is the certificate as originally entered of record with the subsequent modification and record of same, which, together with the foregoing and the copy of the decree of the Supreme Court of Iowa, will constitute a sufficient statement of the case and will show how the questions to be made in argument have become vital in this case by reason of the previous decisions of the Supreme Court of Iowa in other similar cases.

CERTIFICATE.

THE IOWA HOMESTEAD COMPANY,
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And now on the application of the defendant, the Des Moines Navigation Company, it is certified by the court here, and ordered to be made part of the record herein, that by the answer of defendant, in defendant's assignment of errors in the additional abstract, and on the hearing in said cause, the defendant claimed immunity from the entire demand and claim of plaintiff, on the ground that, as he claimed, the same demand and claim had been adjudicated against plaintiff by the Supreme Court of the United States, in the case of *The Iowa Homestead Company vs. The Des Moines Navigation and Railroad Company*, this defendant and others, at the October term thereof A. D. 1872, and that our decision herein was and is against the immunity so claimed by defendant.

And it is further certified and ordered to be made part of the record herein, that by defendant's answer and on the hearing in said cause, defendant claimed immunity from said entire claim and demand, because, as was claimed, the alleged cause of action not having accrued within six years immediately preceding the commencement of the action, was barred by the Iowa statute of limitations, and that to determine whether or not it was so barred, it became material and necessary to decide whether or not the decision of the Supreme Court of the United States, in the case of *Samuel G. Wolcott vs. The Des Moines Navigation and Railroad Company*, was a final determination of the question therein decided, in order to determine when the plaintiff's cause of action accrued, and our decision herein was and is that said decision was not a final determination of said question was and is against the immunity so claimed because of our said decision that said determination was not final.

And afterwards, on the 22d day of July, 1884, plaintiff filed a motion to correct or change the foregoing supplemental decree or certificate because the question, whether the former adjudication set up in the defendant's answer as a bar to plaintiff's action was not, in fact, passed upon or decided by the court. And the court having duly considered said motion, sustained the same on the 23d day of July, 1884, it still being of the June term of said court, and the following order in relation thereto is duly entered as part of the record herein.

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Now on this day plaintiff's motion for correction of certificate is sustained, and it is ordered that the certificate signed in this case by the Chief Justice, of the date of June 19, 1884, be amended as follows: Strike out all of said certificate as shown by erasures now made thereon, and such certificate as corrected is as follows:

It is hereby certified and ordered to be made part of the record herein, that by defendant's answer and on the hearing in said cause, defendant claimed immunity from said entire claim and demand, because, as was claimed, the alleged cause of action not having accrued within six years immediately preceding the commencement of the action, was barred by the Iowa statute of limitations, and that to determine whether or not it was so barred, it became material and necessary to decide whether or not the decision of the Supreme Court of the United States, in the case of *Samuel G. Wolcott vs The Des Moines Navagation & Railroad Company*, was a final determination of the question therein decided, in order to determine when the plaintiff's cause of action accrued, and that our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed because of our said decision that said determination was not final.

DECREE.

THE IOWA HOMESTEAD COMPANY,
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY.

This cause coming on for final hearing, the Iowa Homestead Company appearing by its attorney, George Crane, and the Des Moines Navigation & Railroad Company by its attorney, C. H. Gatch, and the court having duly considered the evidence, the issues and the arguments of counsel, finds that the plaintiff is entitled to recover the principal sums of money shown to have been paid and interest thereon from time of payment.

It is therefore ordered, adjudged and decreed that the plaintiff have and recover of and from the said Des Moines Navigation & Railroad Company, the sum of nine thousand two hundred eleven and 68-100 dollars and interest thereon, at the rate of six per cent. per annum, from the 13th day of March, 1883, and costs of suit, taxed at two hundred nineteen and 95-100 dollars, and that the said plaintiff have execution therefor.

ARGUMENT.

The record presents two federal questions, either decided or the decision of which was necessary to the decree rendered by the Supreme Court of Iowa:

First—The plaintiff in error claimed immunity from the demand of the defendant in error, because *by force and virtue of the decision of this court* in the case of *Wolcott vs. Des Moines Co.*, 5 Wall., 681, and the *Des Moines Co. vs. Burr, Id.*, 689, the cause of action accrued, if ever, at the date of said decision, and was, therefore, at the commencement of this suit, barred by the statute of limitations of the state of Iowa.

The decision of this question, and the necessity therefor, by the Supreme Court of Iowa, are thus stated in the certificate found on page 116 of the original record:

> To determine whether or not it was so bound, it became necessary to decide whether or not the decision of the Supreme Court of the United States in the case of *Samuel G. Wolcott against the Des Moines Navigation and Railroad Company was a final determination of the question therein decided.* * * * And our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed *because of our said decision that said determination was not final.*

Second.—Whether or not the plaintiff in error was entitled to immunity from the demand of the defendant in error, *under the decision and judgment of this court* in the case of *Homestead Company vs. Valley Railroad*, 17 Wall., 153, the controversy therein having been, as plaintiff in error claims, and, as is alleged in his answer, between the same parties, and upon the same issue, and for the same demand, and the decision and judgment therein having been against the validity of such demand.

That this question was necessarily involved and its decision necessary to the decree rendered by the Supreme Court of Iowa, is clearly shown by the record, exclusive of the certificate. It was also shown by the certificate in its original form, but as this was subsequently changed so as to entirely omit the part relating to this question it is now of no consequence unless by possibility the record of the change may throw light upon some phases of the question; or unless the change shall be disregarded as having been made after the jurisdiction of the state court was suspended by the removal of the case to this court.

I.

The question upon which, in the Stryker case, referred to in the statement, the defense of the statute of limitations turned, was, whether the cause of action accrued at the dates of the respective payments of the taxes, or when the question of title was finally determined by the decision of this court as between the claimants respectively, under the so-called river land and railroad grants, and, if at the date of the final decision of that question, whether or not the decision in the cases of Wolcott and Burr, 5 Wall. *supra*, was such final determination. How the question assumed that form is shown by the extract from the opinion in the case, copied into the foregoing statement.

The court having thus in effect made the question of defendant's liability to depend upon the time of "the termination of the litigation by which the title was adjudicated to be in defendant," the ultimate and precise question as shown by the certificate, as above quoted, upon which the case and defendant's liability turned was, whether or not the decision of this court in the cases of Wolcott and Burr was a final adjudication of the question of title therein passed upon; in other words, upon the effect to be given to a decision of this court. While, in terms and immediately, immunity was claimed under the statute of limitations, yet the ultimate and essential ground upon which the claim must be allowed, if at all, was that, according to the true interpretation and effect of the decision in the cases just named, a cause of action thereby and of that date accrued to the defendant in error.

Plaintiff in error maintained that the decision in these cases was final, while the court held that the question was not finally decided until 1873, meaning in the cases of *Williams vs. Baker*, 17 Wall., 144, and *Homestead Company vs. Valley Railroad*, *Id.*, 153, and, so holding, necessarily held that the action was not barred. From the contrary holding it would have as necessarily followed that the action was barred. There was no question requiring a construction in any respect of the Iowa statute of limitations, nor was its application to the case dependent upon any controverted fact proposition. The real and only question, therefore, was, whether or not the decision of this court in the Wolcott and Burr cases was *final* in such sense as that, according to the rule or doctrine laid down by the Supreme Court of Iowa, a cause of action then accrued, the decision having been made in cases to which, by intervention, defendant in error was a party, as will be seen by reference to the record, pages 88–100, and which decision, without reconsideration, has been several times reaffirmed, and of which the court in *Homestead Company vs. Valley Railroad*, 17 Wall., on page 162, used this language:

> The main question involved in this case is the question of the title to the Des Moines river lands which was settled several years ago by the decision in the cases of Wolcott and Burr and in the subsequent and unreported case of *Riley vs. Wells* adversely to the title set up by the appellants. At the present term of this court the principles involved in these decisions have been reconsidered and reaffirmed.

The question here is whether upon that question the decision of that court is final, or whether, being a question as to the proper interpretation and effect of a decision of this court, it is a "federal question" within the meaning of the act of congress.

It is respectfully submitted that upon this point the case is within the principle of the following decisions of this court: *Dupasseur vs. Rochereau*, 21 Wall., 130, in which on error to the Supreme Court of Louisiana this court took and exercised jurisdiction to determine whether or not, upon a question of the order of priority of liens, the decree of the state court foreclosing a mortgage, accorded due force and effect to a decree previously rendered in the United States circuit court for that state foreclosing another mortgage on the same premises; and in *Embry vs. Palmer*, 2 Supreme Court Reporter, 25, in which it was held that this court might, on error, review the judgment of the Supreme Court of Connecticut enjoining the collection of a judgment rendered by the Supreme Court of the District of Columbia.

While in terms the certificate states the question to have been whether or not the decision in the Wolcott case was a *final* decision of the question of title, it is obvious that it could only have been, whether or not, upon the theory of that court as to the nature of the implied promise and the condition upon which a suit could be brought, it was such a decision of the question as gave to the defendant in error an immediate right of action upon it.

The defendant in error having been a party in such sense and manner, certainly, as to be concluded by the adjudication, the decision was necessarily final, unless and until in some manner reviewed and set aside by this court, of which having been done there is no pretense. The Supreme Court of Iowa must therefore necessarily have held that the question of title was not one of the questions decided in the Wolcott and Burr cases, as otherwise it must necessarily have held a cause of action to have then accrued and to have been barred long before the commencement of this suit. The question therefore in reality was, whether or not the question of title was decided, and not as to its being or not being final. How long must the defendant in error have waited to find out whether or not the decision was final and gave it a right of action? Was it to wait until the commencement of another action, and if such action had never been commenced would the decision have never become final? Truly, error is the most prolific of mothers. What a brood has come of the original one of taking a devious by-way in the case of *Goodnow vs. Moulton*, *supra*, instead of following the plain and century beaten pathway of *Homestead Company vs. Valley Railroad*, *supra*, and *Garrigan vs. Knight*, 47 Iowa, 525, with respect to the law of *voluntary* payments.

II.

That the defense of former adjudication by this court, as shown by the record, presents a federal question is not controverted, but it is claimed that it was waived by failure of plaintiff in error, to insist upon it in his printed argument filed in the state court; and the *opinion* of that court is relied upon as the evidence to this court of such waiver. Assuming for the present, that this court will accept the statement of the opinion that the state court, for the reason therein also stated, *could not* determine the question of prior adjudication, as proper and sufficient evidence that it *did not* determine it, in the sense of not having in fact considered and passed upon it, the question still remains, whether or not *its determination was necessary to a decree such as was rendered.*

If the claim of immunity under the prior adjudication was properly made and presented to the court for decision, and the question was of such controlling character that its correct decision was necessary to any final judgment in the case, then, notwithstanding the court may not, in fact, have *considered* it, the decree for the defendant was in legal effect a decision against the immunity claimed. Section 709, Revised Statutes, was intended to secure to every litigant whose rights should depend on any question of federal law, the right to have such question decided by this, the highest federal tribunal, wherever such right should be denied him in the state courts. The jurisdictional fact is not, that in the *opinion* of the state court, the claim of right or immunity is not well founded, but the fact of failure of the party claiming it to secure the same by the judgment or decree of that court. In other words, whenever the federal question is such and so presented that its decision is necessary to a final judgment in the case, unless the judgment of the state court is in favor of the party claiming the right or immunity, *simply because it is not*, the case is brought within the unquestionable jurisdiction of this court for determination on writ of error. If this were not so it would always be in the power of the state court by simply *ignoring* a federal question, to make its judgment final and conclusive against the right or immunity claimed, *when it could not do so by an expressly adverse decision.*

In *Murdock vs. City of Memphis*, 20 Wall., 590, this court, stating the conclusions of an elaborate opinion on this and other questions growing out of the same statute, on pages 635–6, lays down the following, among other, propositions:

> 1. That it is essential to the jurisdiction of this court over the judgment of a state court that it shall appear that one of the questions mentioned in this act must have been raised and presented to the state court.
>
> 2. That it must have been decided by the state court or that its decision was necessary to the judgment and decree rendered in the case.
>
> *   *   *
>
> 7. But if it be found that the issue raised by the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the state court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the federal question, then this court will reverse the judgment of the state court, and will either render such judgment here as the state court should have rendered or remand the case to that court as the circumstances of the case may require.

And in the same opinion, on page 632, it is said:

> It was, no doubt, the purpose of congress to secure to every litigant whose rights depended on any question of federal law, that that question should be decided for him by the highest federal tribunal, if he desired it, when the decisions of the state courts were against him on that question. That rights of this character guaranteed to him by the constitution and laws of the union, should not be left to the exclusive and final control of the state courts.

It surely cannot be that such rights cannot be defeated by the *action* and yet may be by the *inaction* of state courts.

In *Chouteau vs. Gibson*, 4 Supreme Court Reporter, 340, it is said:

> From the beginning it has been held that to give us jurisdiction in this class of cases it must appear affirmatively on the face of the record, not

> only that a federal question was raised and presented to the highest court of the state for decision, but that it was decided, *or that its decision was necessary to the judgment or decree rendered in the case.*

It will not be controverted that the decision of the question made in this case by the defense of former adjudication, *if presented for decision*, was necessary to the decree rendered by the Supreme Court of Iowa.

The record shows that the defense of former adjudication was plead—page 5—and that it was proved--pages 17 to 38. Counsel for defendant in error in his brief, page 2, says:

> The answer sets up the decision in the former suit as a bar to the plaintiff 's right to recover.

And the Supreme Court of Iowa says in its opinion, N. W. Rep., page 231:

> The question of former adjudication * * * is not discussed by counsel for defendant in this case in his *printed brief*, though it was pleaded as a defense.

Among the errors assigned by defendant in error—record, page 113—in his assignment of errors complained of as having been committed by the lower court, is the following:

> 3. The court erred in holding that plaintiff was not estopped from prosecuting this suit by the former adjudication in the said former suit of the *Iowa Homestead Company vs. The Des Moines Navigation and Railroad Company* and others.

The Code of Iowa, section 3207, provides with respect to the assignment of errors as follows:

> An assignment of error need follow no stated form but must, in a way as specific as the case will allow, point out the very error objected to. Among several points in a demurrer, or in a motion, or instructions, or ruling in an exception, it must designate which is relied on as an error, and the court will only regard errors which are assigned, with the required exactness; *but the court must decide on each error assigned.*

In *Baker vs. Kerr*, 13 Iowa, 384, construing this section and holding that literal compliance therewith is not necessary, the following extract from *Willets vs. Ridgway*, 9 Ind., 367, construing a similar provision in the constitution of that state is quoted with approbation:

> These and other considerations have led the court to inquire, when does a question, in the sense of the constitution, arise in the record? * * * It must be a question the decision of which is necessary to the final determination of the cause, and which the record presents with a fullness and distinctness rendering it possible for the court to comprehend it in all it bearings.

Following which the Iowa court adds:

> With the spirit of these views, *as well as the provisions of our statute*, we shall, as heretofore, endeavor to comply.

Nothing can be clearer than that the question of prior adjudication was, by every proper step and method, raised and presented to the Supreme Court of Iowa for decision.

Having been so raised and presented was it subsequently waived? The burden is upon defendant in error to show that it was. Has he shown it?

Had the Supreme Court of Iowa reason to believe, and did it believe, that the defense of former adjudication was in fact abandoned?

In the opinion, referring to this and another case which by permission and for the convenience of the court was submitted with it, it is said:

> The question of former adjudication, discussed in the fifth point of the foregoing opinion, is not discussed by counsel for defendant in this case in his printed brief, though it was pleaded as a defense. Counsel for plaintiff in this case filed a printed brief used in the former case, but upon the fifth point it is not at all applicable, for the reason that the facts involved in the pleas of former adjudication are not identical in each case. The two cases were discussed at the oral argument together, all the points involved in each case being considered, but we were left to the printed briefs and abstracts in order to make application of the arguments properly to the separate cases. Since the submission of the cases, counsel for each party has been called upon to express his understanding of the points to be determined in the cases separately. Counsel for defendant claims that the question of prior adjudication, while not presented in his printed brief, was argued orally, and is therefore in this case; counsel for plaintiff claims that it is not. Certain it is that it is not made in the

printed brief for defendant, and we are unable to say that it was made on the oral argument *as applicable to this case.* The counsel for defendant having failed to present this point in his brief, he cannot, according to the spirit of our rules, urge it on oral argument. *In view of the want of agreement between counsel*, we are required to hold that the question of prior adjudication cannot be determined in this case.

It will be noticed that it is distinctly stated that "the two cases were discussed together at the oral argument, *all the points involved in each case being considered.*" That the point in question could not have been discussed and considered in the other case is evident, as according to the further statement of the opinion, it would not have been applicable to that case owing to the dissimilarity of the "facts involved in the pleas of former adjudication" in the two cases. Yet the court, overlooking this difference in the issues, as a means of applying the oral argument, after the submission, called upon counsel for each party to express his understanding of the "points to be determined in the cases." In response, it is said, "counsel for defendant claims that the question of prior adjudication, while not presented in his printed brief, was argued orally, and is therefore in this case; counsel for plaintiff claims that it is not." Whereupon after stating that according to the *spirit* of its rules, a point not presented in the printed brief cannot be argued orally the court concludes "in view of the want of argument between counsel" that "the question of prior adjudication cannot be determined."

It seems not to have been denied by counsel for defendant in error that the question was argued orally, the language of the court clearly importing that he only claimed, that, for some reason not stated by the court, it was not in the case. It *was in the case*, as has already been shown, and the inquiry, by the court of counsel, could only have been with a view to determine whether or not it had been waived or abandoned by plaintiff in error. Why refer the matter to counsel for *agreement* if the failure to make the question in the *printed brief* was of itself a waiver or abandonment? Unless, in case it were found to have been argued orally, that fact was to be taken as showing that it was not waived, why was the inquiry made? And having been made, and counsel for plaintiff in error claiming that it was so argued, and opposing counsel not having denied that it was, why should not the court have assumed that it was and held accordingly?

But will this court permit its jurisdiction to depend upon any such contingency as the failure of counsel in the state court, after submission in that court, to *agree* as to the "points to be determined in the case?"

The court does not say either that the question was waived or that it was not argued orally, and does in effect say that it was not waived by failure to present it in the printed brief, and that the only reason why it could not be determined was "the want of agreement between counsel" as to what were "the points to be determined" in the case.

Upon the record, excluding the opinion, there can be no doubt but this court would be required to find and hold that the question of prior adjudication was properly raised and presented for decision, *and the opinion does not say that it was not.*

It will be seen by reference to the copy of the record of the change copied into the statement, page 5, that plaintiff's motion for change was alleged to be "because the question whether the former adjudication set up in the defendant's answer as a bar to plaintiff's action was not *in fact* passed upon or decided by the court." While the certificate recites that immunity under the prior adjudication was claimed, by "the answer of defendant, in defendant's assignment of errors, *and on the hearing in said cause*," the motion complains only of the recital that the "decision herein was and is against the immunity claimed by defendant," and, therefore, inferentially admits that all of the other statements, including the one that the immunity was claimed on the hearing, are true.

The change in the certificate was made July 22, 1884; the writ of error and bond, having been previously allowed and approved, were filed on the 15th of the same month, and the citation was served on the next day, the 16th. The change was, therefore, after the removal, and consequently after the jurisdiction of the state court to take any further proceedings in the case was suspended. This was not a merely formal amendment of the record to conform to the admitted facts, but if anything more was intended by the change than to exclude the idea that the question was *in fact* considered and passed upon by the court, it was a further proceeding in the case with respect to a controverted matter.

It is conceded to be the settled practice of the Supreme Court of Iowa to consider only such errors as are presented in argument. But this is upon the assumption that what is not argued is waived. Such a practice can of course have no application to a case in which errors are assigned and argued orally, or to a case in which, though not argued, the court is by *any means* advised that they are not waived, but are, on the contrary, insisted upon.

Counsel quite unwarrantedly says in his brief that "the certificate signed by the Chief Justice contained the *false statement* that the question of former adjudication was decided by the court." The statement of the certificate is that the decision of the court "was and is against the immunity claimed under that adjudication," and is true.

The last paragraph of his brief is unaccountable, as the certificate originally and as changed specifies the *Iowa* and not the *New York* statute of limitations.

C. H. GATCH,
Attorney for Plaintiff in Error.